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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

February 5, to July 12, 1918.

BY ALPHONSO HOWE of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

February 18, to May 20, 1918.

BY JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

November 31, 1917 to February 6, 1918.

BY J. L. FORT, of the Dexter Bar

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1917.

(*Continued from Volume* 198)

GRACE MAST, Respondent, v. LEO HIRSH, Appellant.

Kansas City Court of Appeals, February 18, 1918.

AUTOMOBILE: Husband and Wife: Master and Servant: Entertainment of Visitors. A husband kept an automobile for the use of himself and family. His wife took out the car for the purpose of taking her mother and sister, who were visiting her and her husband, on a pleasure drive. On the drive she negligently collided with a wagon and team, injuring a woman in the wagon. The husband knew she took the machine whenever she wanted it, but did not know that she was out with it on this occasion. It was *held* that the trial court should have declared, as a matter of law, that she was not the husband's servant and that he was not liable.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

REVERSED.

Scott J. Miller and *Karl Hirsh* for appellant.

J. M. Davis & Son for respondent.

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ELLISON, P. J.—Plaintiff's action is for personal injuries occasioned by the alleged negligence of defendant's wife. Defendant owned an automobile which he kept for the use of himself and his wife. On September 26, 1916, his wife was driving the car for pleasure and was accompanied by her mother and sister who were visiting her and defendant. There was evidence tending to prove that she drove the car so carelessly and negligently as to crowd plaintiff and her wagon and team to the side of the road and into a ditch, frightening the team so that they became unmanagable and plaintiff was thrown to the ground and injured. She recovered judgment in the trial court.

Plaintiff disclaims any right to a judgment against defendant on the theory that as husband he is liable for his wife's torts; and bases her right to the judgment on the ground that the wife of defendant was his agent and servant in running the car, and having run it negligently, he is liable for her act. The only evidence relied upon to show that she was his agent or servant consisted in the fact that she was his wife and that he kept the car for his and her use; that she drove it for the pleasure of herself and those she took with her, and that he knew she was driving with her relatives that day. There is no pretense that he ordered, directed, or requested her to drive the car that or any other day. A number of authorities cited in the brief for plaintiff support her right to the judgment. [Dailey v. Maxwell, 152 Mo. App. 415.] But since the case was tried, the Supreme Court has disapproved of those cases, and has held that mere permission by the husband or father that his wife or children might use his car for the pleasure of themselves and friends, did not constitute them his agents or servants. [Hays v. Hogan, 273 Mo. 1, 200 S. W. 286.]

Our especial attention has been called by plaintiff to Crawford v. McElhinney, 171 Iowa, 606 and Missell v. Hays, 86 N. J. L. 348. We think neither case is in point on the facts. In the first, the husband owned and kept the automobile for himself and his wife and on

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the occasion when a child was killed he and she, for their mutual entertainment, had gone to a fair in or near the town where they lived, she driving. The court said that "he was present at the time and permitted his wife to operate the car on the trip. The mere fact that he transacted no business does not argue that he was not engaged with his wife on the trip in question for their mutual pleasure." Again the court said: "The wife may be the agent or employee of her husband. The evidence of defendant is such as to show that at the time in question his wife was in his employ, in the sense that she was engaged in the transaction of his business or the business of both." Nothing of the nature there shown appears in the case under consideration.

In the second case the father kept an automobile for the general use of himself and members of his family. His son used it sometimes with, and sometimes without, his express assent. On the occasion giving rise to the action, his son took out the automobile and had therein his mother and sister, and two others, one a young man, who was his own guest, and the other, a young lady, the guest of his sister. The court held that "it was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways." But, the court added that as there was evidence in the case tending to show that the son invited his mother and sister to take a ride, as his guests, on a trip which he was taking for his own pleasure or business and that they were doing so as such and not as members of his father's family, it became a question for the jury whether he was acting for himself or as the servant of his father. The effect of that case is that if a father keeps an automobile for the general use of himself and family and one member of the family (though without the knowledge of the father in the particular instance) takes other

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members of the family out for their health or recreation, he is prima facie performing the service for his father in thus doing the duty of the father. But if such member of the family is on a jaunt of his own, and invites members of the family to go along as his guests, that would establish prima facie that he was acting for himself as distinguished from performing a service for his father; the whole evidence in such case making a question for the jury as to the capacity in which the driver of the machine was acting.

The evidence in the present record does not make a case of that character. Here the wife was out on a pleasure drive of her own with her mother and sister, with no pretense of direction from the husband. Plaintiff suggests that the mother and sister of the wife were, at the time, visiting at the house, and that it was the husband's duty to provide entertainment, diversion or pleasure for them. We think that that is stretching the string whereby it is sought to tie this case to the doctrine of master and servant, to the breaking point. Whatever social duty a husband may owe to his wife's relatives, the defendant was not performing them at the particular time at which the plaintiff was injured. The wife herself, apart from any act of the husband, took a pleasure ride and invited her mother and sister as her guests.

The case of Hays v. Hogan, was certified to the Supreme Court by the Springfield Court of Appeals on account of Judge STUBGIS deeming the opinion in conflict with cases named. [180 Mo. App. 237.] The question is discussed at length in both opinions in the Springfield court and in the opinion of Judge WOODSON in the Supreme Court. The latter court in repudiating Dailey v. Maxwell and like cases, made this declaration: "That the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own

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business or pleasure; and the fact that he had the father's special or general permission to so use the car is wholly immaterial." The same rule was announced later in Bollman v. Bullene, 200 S. W. 1068.

If the member of the family (competent to run a car and to exercise the care required by statute) takes the car out, though with the consent of the husband or father, on his own business or pleasure, the husband or father is not liable for his negligence; but if such member under the direction of the husband or father, express or implied, is performing a duty which the latter owes, a liability arises for negligence. It should, however, be borne in mind that the member of the family cannot force his or her service on the husband or father against his will, and however conducive to the health or pleasure of the member of the family taking out the car, or to the health or pleasure of other members of the family he may take with him, there must appear authority from the father, express or implied, before the former may be called his servant engaged in his business. It is plain to see that questions of fact, hard to determine, will present themselves in certain instances, but they must be settled by a jury as in other difficult cases, unless, as in this case, the facts are so far uncontroverted that the court may pass judgment upon them as a matter of law.

The judgment will be reversed. All concur.

MARY A. VOLLRATH, Appellant, v. ELLEN STEVENS, Respondent.

Kansas City Court of Appeals, February 18, 1918.

1. **LANDLORD AND TENANT: Damages: Personal Injuries.** A landlord is under no obligation to make repairs to premises let, in the absence of a written agreement so to do, but if he voluntarily undertakes to make them he is bound to exercise ordinary care to see that the work is not negligently done and that they will last a reasonable length of time under the circumstances.

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2. ———: ———: **Defective Repairs: Misfeasance.** When a landlord voluntarily assumes to repair defective premises, he takes upon himself the burden to use ordinary care to make such repairs in such a manner that they will last a reasonable length of time and in discharging such duty, if he fails to remove material that should have been removed to make the place reasonably safe, he is guilty of misfeasance and not non-feasance.

3. ———: ———: **Question for Jury.** Where a tenant from month to month had been such for a great many years and the landlord makes repairs that lasted two years, it was a question for the jury whether the landlord had discharged his duty to the tenant in making repairs that lasted only two years.

4. ———: **Independent Contractor: Damages.** If a lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application, the accident having happened long after the repairs were made and accepted by the landlord.

5. **INSTRUCTIONS: Landlord and Tenant: Repairing Premises.** An instruction which told the jury that if materials used by a landlord in making repairs to rented premises were unsuitable, insufficient and defective and that the landlord failed to replace any weak or rotten supports and flooring with reasonably safe supports, the tenant might recover damages received when the steps and flooring of the premises gave way two years after the landlord had voluntarily made repairs, was erroneous because the landlord was only bound to use ordinary care in doing these things.

Appeal from Jackson Circuit Court.—*Hon. I. N. Watson,* Special Judge.

AFFIRMED.

T. A. Mastin and *Paul R. Stinson* for appellant.

Scarritt, Scarritt, Jones & Miller for respondent.

BLAND, J.—This suit was brought on May 26, 1916, by plaintiff, a tenant, against defendant, her landlord for personal injuries alleged to have been suffered by plaintiff on the 27th day of March, 1911, through the negligence of the defendant. There was a verdict and judgment for eighty-one hundred and twenty-five ($8125) dollars in favor of plaintiff which she voluntarily remitted to the sum of seventy-five hundred ($7500)

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dollars. Thereafter the court sustained defendant's motion for a new trial, assigning as a reason therefor "that the court erred in giving instruction No. 1 on behalf of the plaintiff, the court being of the opinion that the case should have been submitted to the jury on the theory that the defendant had agreed to keep the premises in repair as alleged in the petition, and because the case should not have been submitted on the theory that defendant was negligent in making the repairs."

The parties concede that plaintiff's petition proceeds upon two theories: First, that the landlord contracted to keep the premises in repair and failed to do so; second, that the landlord volunteered to make repairs and was negligent in doing the work. Plaintiff submitted her case to the jury on the latter theory and abandoned the former. We are only concerned with that theory of the case upon which it was tried. The question for our decision being whether plaintiff made out a case on the theory submitted by her to the jury.

Plaintiff had been a tenant from month to month of the defendant for nineteen years prior to the accident. The tenanted premises was an old frame house with a summer kitchen on the rear. The latter was enclosed and was a part of the house proper. There was a door connecting the kitchen to the house but the kitchen floor was somewhat lower than the door. Reaching from the kitchen floor to the door was a pair of steps. The kitchen was used in summer for cooking and at times in the winter for boiling dinners. In June, 1909, the steps had become very shaky and the floor beneath shaky and when the steps were walked upon the floor sagged. Plaintiff complained to defendant's agent of this condition and he made an examination of it and told plaintiff he would have a new floor and steps put in and that he would have the floor and supports fixed so that they would be in a safe condition. The agent sent a carpenter to the house who tore up the floor and made other repairs that plaintiff could not see as

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she was engaged at the time in nursing a sick son. After the carpenter had finished the work the floor was no longer shaky or sagging and it and the steps appeared to plaintiff to be all right until about a week before the accident when the steps began to slant down "a little bit and on the side." "It was hardly perceptible."

At the time of the accident plaintiff was walking from the main part of the house down the steps, intending to go to the summer kitchen. When she placed her weight on the second or lower step "the floor gave down," "and the steps went down," causing plaintiff's foot to slip and she fell and broke her back. The steps rested upon the floor and were nailed to what was described as a baseboard placed against the main part of the house under the door. The floor rested upon stringers and the stringers were nailed to three props which rested on the floor of the cellar, there being a cellar under the entire house, including the summer kitchen. An examination after the accident showed that the steps had pulled away about four inches from the baseboard, and that the baseboard was in a decaying condition and rotten, and the nail holes therein were rotten and larger than the nails. Plaintiff's daughter went into the cellar and there found that the floor and stringers were rotten and covered with mold and they pulverized in the daughter's fingers. The support which was directly under the steps was rotten and in a slanting position, indicating that it had given away. The support was so rotten that plaintiff's daughter could scrape the rot loose with her finger nails. The steps overhead were green with rot. The floor under the steps had sagged down as much as two inches as far as to the door. The steps themselves were in good condition except the ends were decayed some.

The carpenter who made the repairs in 1909 was not a witness, but there was evidence that when the carpenter repaired the steps he used part new and part old flooring. The old steps were put back after the repairs were made underneath, as the steps were in

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good condition at that time. There was no direct evidence as to the condition of the baseboard, flooring, stringers and supports immediately after they had been repaired in 1909. However, there was the expert testimony of a carpenter who examined the premises shortly before the trial and who testified that new or first-class boards if in a dry place would last from twenty-five to thirty years. Plaintiff contends that as the materials were so rotten in 1911, or two years after the repairs were made, that, in view of the testimony that new or first-class boards in a dry place would last for twenty-five or thirty years, there is an inference that the material used in 1909 in making the repairs was defective and that defendant's agent should have known of its defective condition.

The landlord was not under any obligation to make these repairs in 1909, but having voluntarily entered upon the task of making them, she was bound to exercise ordinary care to properly make them. But the fact that she assumed to make the repairs placed no further obligation upon her than to use ordinary care in making them so that they would last a reasonable length of time. The fact that she assumed to make the repairs did not impose upon her the duty to continue making them, as her obligation was not the same as that of a master toward a servant. Plaintiff seems to contend that it was. In the case of master and servant the master is under the obligation to keep the premises in a reasonably safe condition at all times, whereas the duty upon a landlord who voluntarily undertakes to make repairs is only to see that the work be not negligently done, and if the landlord uses ordinary care to repair the premises to last a reasonable length of time he discharges his full duty.

We cannot say as a matter of law that because the boards used and the materials left and not disturbed by the landlord in making these repairs lasted two years after the repairs were made the landlord fulfilled her full duty toward the tenant. In this case it was a question for the jury to determine whether the land-

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lord used ordinary care to repair the premises so that they would last a reasonable length of time under all the circumstances including the circumstance that the tenancy was one from month to month only. The house was an old one and the landlord was not under the duty to use new or first-class boards in making the repairs or to remove material that would last a reasonable length of time under all the circumstances. Because a portion of the premises got out of repair it was not the duty of the landlord to reconstruct out of new material that part of the premises. It was natural for the landlord under the circumstances to use old boards found around the premises to make the repairs but, of course, she could not use for that purpose boards that were not reasonably sound and sufficient, in view of the circumstances. It was not sufficient to show by expert testimony that new or first-class boards in a dry place would last twenty-five to thirty years. In the first place the landlord was not under the duty to furnish new or first-class boards or to remove old material that would last a reasonable length of time. The expert testimony should have related to the length of time reasonably sound and sufficient boards and material would last under the circumstances rather than new or first-class boards. There was no evidence that reasonably sound or sufficient boards and material would not rot in two years in the situation these boards and material were in. There is nothing in the evidence to show the degree of dryness or dampness that was present that might tend to disintegrate the boards. It is true the summer kitchen was enclosed and for that reason was protected from the elements but there was evidence that there was a cellar beneath the summer kitchen and there was no evidence as to the question of dryness or dampness of this cellar and the supports which were in it and the stringers and flooring above, which constituted its roof. But the fact that the steps themselves were in good condition, although old steps, and that the decay was under the steps and in the cellar and that the stringers were moldy and green

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with rot suggests that the boards were not in a dry place but that much dampness was present. Of course, in considering the question of the degree of care required of the landlord in leaving old material and in furnishing reasonably sound or sufficient boards, all of the circumstances surrounding the premises should be taken into consideration, including the question of damp premises. The landlord should be required to use ordinary care in repairing the premises so that they would last a reasonable length of time in view of the dampness present, if any.

For these reasons we think that plaintiff failed to make out a prima-facie case, that is, she failed to show that the boards were in a rotten condition and not reasonably sound and sufficient two years prior to the accident, and that a reasonable inspection of the materials used at that time on the part of the landlord or her agent would have disclosed such a condition. The landlord was not under the absolute obligation to use reasonably sound and sufficient boards and in leaving old material in making the repairs but she was only obliged to use ordinary care in the selection of such boards. Plaintiff not only failed to show these things but there is a strong inference in the evidence that the landlord did use ordinary care in making these repairs, for the parts when repaired appeared to plaintiff to be perfectly strong and safe and they lasted nearly two years after the repairs were made. It cannot be said that because the steps gave away two years after the repairs were made that there is a presumption that they were negligently made. If the steps had given way a short time after the repairs were made, there might be such a presumption, but there can be none when they gave way after the expiration of so long a time, especially in view of the testimony of the expert witness to the effect that boards that were not new or in first-class condition, that is to say, old boards, might have been good two years before and not be good at the time of the accident.

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As this case must be retried, it is necessary for us to pass upon the other points made by the defendant.

Defendant attacks plaintiff's instruction No. 1 on the ground that it submitted to the jury that defendant negligently failed to *replace* the weak or rotten supports to said steps and the flooring upon which they rested, with reasonably safe supports . . . so that after said repairs, if any, were made, said steps, supports and flooring *remained* and were unsafe.

It is urged by defendant that under this instruction the jury might have found for plaintiff on account of defendant's non-feasance rather than her misfeasance. It is well established in cases like this that the landlord must be guilty of misfeasance and not non-feasance before he is rendered liable. [Finer v. Nichols, 172 Mo. App. l. c. 536.] However, when defendant voluntarily assumed to repair the defective premises she took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair if she failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance and not non-feasance. [Finer v. Nichols, supra, l. c. 538.]

We think that plaintiff's instruction No. 1 is erroneous for the reason that it casts a burden upon the landlord which she was not required to assume. As has already been stated, the duty of the landlord in voluntarily assuming to make these repairs was to use ordinary care in making them so that they would last for a reasonable length of time under the circumstances. The instruction leaves out altogether the question of the care required of the landlord in making the repairs. It told the jury that if the materials used in making the repairs were unsuitable, insufficient and defective and that the landlord failed to replace any weak and rotten supports and flooring with reasonably safe supports, that plaintiff might recover, while the only duty upon the landlord was to use ordinary care

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in doing or failing to do these things. On the next trial this instruction should be recast so as to conform to the law as stated in this opinion.

The evidence shows that when plaintiff complained of the defective condition of the premises in 1909, defendant's agent sent a carpenter to make the repairs and defendant says that as the carpenter furnished his own materials and used his own method in doing the job, that he was an independent contractor and for that reason if the result of his work was that the repairs were not properly made, the defendant is not liable. This contention of the defendant is not well taken. If the lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application.

The judgment is affirmed. All concur.

EDITH SANDS, Respondent, v. KANSAS CITY, Defendant, THOMAS H. BROUGHAM, Appellant.

Kansas City Court of Appeals, February 18, 1918.

1. **NEGLIGENCE: Personal Injuries: Appurtenances. Plaintiff rented of one of the defendants the first floor and basement of a two-story house, but knew nothing of a coal cellarway under the sidewalk in front of the premises. While walking on the sidewalk she stepped on the cover of the coal hole and it gave way, due to the decayed condition of the wooden rim on which the cover rested, and she was thereby severely injured. It was *held* that as there was not only absent from the premises anything that made it apparent or to suggest to the plaintiff (the tenant) that the coal cellarway existed but the tenant was able to enjoy the use of the premises without the use of the cellarway, such cellarway was not an appurtenance to the premises and therefore, plaintiff, as tenant, not being required to keep the cellarway in repair, was not barred, by reason of her tenancy of the premises, from recovering damages for her injuries from the owner.**

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2. **REAL ESTATE: Appurtenances: Subterraneous Recess.** Where a tenant rents premises and appurtenances thereto and nothing is reserved by the landlord and nothing said as to upon whom shall rest the burden of keeping them in repair, the duty is on the tenant to keep them in repair and the obligation is solely upon him to look and see whether the premises remain in repair.

3. ———: ———: ———. A substerraneous recess under a public sidewalk, unknown to a tenant of adjacent premises, the landlord having said nothing of its presence and there being nothing present to suggest that it actually existed and it not being necessary to the enjoyment of the premises, is not an appurtenance that the tenant was required to keep in repair.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

Harding, Murphy & Harris and *M. M. Bogie* for appellant.

G. B. Silverman and *J. F. O'Sullivan*, for respondent.

BLAND, J.—This was an action for personal injuries against the defendant, Thomas H. Brougham, and Kansas City, Missouri. There was a verdict in favor of the city but against defendant Brougham in the sum of three thousand ($3000) dollars, and the latter has appealed.

The petition alleged that on the 9th day of October, 1915, the defendant Brougham was the owner of premises in Kansas City, Missouri, known as 1414 Washington Street; that under the sidewalk in front of said premises said defendant maintained a cellarway or coal hole; that the same had a covered opening in the sidewalk above into which plaintiff fell by reason of the cover giving way while she was walking along and over said sidewalk; that the sidewalk at the place where said opening existed was rotton, decayed and badly out of repair; that by the exercise of ordinary care said defendant could have discovered such de-

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fective condition and by due care could have had time to remedy the same after the discovery and before the accident. Defendant Brougham filed an answer alleging that plaintiff and her husband rented the premises known as 1414 Washington Street, in Kansas City, Missouri, together with the cellarway or coal hole; that they were said defendant's tenants at the time of the alleged injury to plaintiff, and that it was the duty of plaintiff or her husband to have kept it in repair.

This defendant urges that his demurrer to the evidence should have been sustained. On the part of plaintiff the evidence shows that the house known as 1414 Washington Street in Kansas City, Missouri, consisted of two stories and a basement, and that plaintiff rented of defendant Brougham the first floor and basement. Plaintiff testified that she rented nothing but the first floor and basement; that nothing was said in reference to any coal cellarway by anyone at the time she rented the premises; that prior to her injury she knew nothing of the presence of the coal cellarway or the cover on the coal hole; that the coal cellarway and cover were not in a position where she could have anticipated their presence, or would ordinarily have discovered them. The coal cellarway did not connect directly with the basement; it had a doorway but the door itself was gone, connecting it with an area way made primarily for the purpose of allowing a basement stairway, which was constructed from the sidewalk to the basement door on the outside of the house. The opening into the coal cellarway opened into this area way and the area way was connected to the street by the stairway and to the basement by the basement door. The entrance to the coal cellarway was about three steps from the basement door.

Plaintiff rented these premises on July 2, 1915, but did not take possession until July 6th of that year. She had occupied this and another portion of the premises for nearly a year prior to her injury. She testified that she seldom went out into the area way in front of the basement or used the stairs to the street as the

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stairs were "rickety," and she was afraid to use them. She stated, however, that she had been out into this area way and had seen a dark space which she found out after the accident to be an entrance to the coal cellarway, but there was nothing in the dark space to indicate to her that there was an opening that ran under the sidewalk where she fell.

On the part of this defendant, his agent testified that when plaintiff rented the premises nothing was said in reference to the coal cellarway but that he understood that the coal cellarway went with the basement and that plaintiff rented it along with the premises actually mentioned. In connection with this defendant's contention that his demurrer to the evidence should have been sustained, he urges that while the coal cellarway was not mentioned at the time the premises were rented that it constituted an appurtenance to the premises, and for that reason although the coal cellarway was not mentioned it was covered in the rental. That plaintiff's husband having rented the coal cellarway, it was his duty to keep the same, together with the coal hole opening and cover, in repair and not the duty of this defendant. And in connection with this point defendant points out that no one but this tenant had any right to the use of the basement and the area way into which the coal cellarway opened, and that plaintiff had the right to the exclusive use of the coal cellarway if she had known it was there and had desired to use it.

As to what constitutes an appurtenance is not always easily ascertainable. The rule in relation to what is included as appurtenances, not mentioned in the leasing of premises, is stated in Barrett v. Bell, 82 Mo. l. c. 114:

"In a well considered case in the court of appeals of New York, it was said 'Easements exist as appurtenant to a grant of lands, and as arising by implication, only by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication, or as incident or appurtenant to the lands granted,

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except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. Upon the grant of a mill, every right necessary to the full and free enjoyment of the mill, passes as incident to the grant; and the necessity measures the extent and duration of the right. . . . When the necessity ceases, the rights resulting from it cease. A mere convenience is not sufficient to create or convey a right or easement, or impose burthens on lands other than those granted, as incident to the grant. In all cases, the question of necessity controls.' [Ogden v. Jennings, 62 N. Y. 526, 531, and case cited, 531, 532.] . . .

As the evidence in this case does not show the use of the kettle was a 'necessity' this fact deprives such use of the chief attributes of an appurtenance. 'It was a matter of ease and convenience only,' which having arisen by mere consent of the parties, could be destroyed by withdrawing that consent at any time. [Grant v. Chase, supra; Johnson v. Jordon, 2 Met. 234.]" [See also Mulrooney v. Obear, 171 Mo. l. c. 619; Bussmeyer v. Jablonsky, 241 Mo. 681; Witte v. Quinn, 38 Mo. l. c. 692.]

It is thus seen (Barrett v. Bell, supra) that a thing claimed to be an appurtenance must be a necessity and not a matter of ease and convenience only. The evidence in this case shows that plaintiff not only did not know of the presence of the coal cellarway but that she had no use for it as she did not use coal but was using gas at the time. We do not think the fact that the coal cellarway was not used alone necessarily determines whether it was an appurtenance to the premises demised. However, the facts in this case show that the tenants did not know of the existence of the coal cellarway nor was there anything present to make it apparent or to suggest to the tenant that there existed a coal cellarway. Coal cellarways through sometimes present are not usually found in connection with residences, even in cities. There was not only absent from the premises anything that made it apparent or

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to suggest to the tenant that the coal cellarway existed, but the tenant was able to enjoy the use of the premises without the use of the coal cellarway. Under such circumstances the coal cellarway could not have been necessary to the proper enjoyment of the premises demised.

It is true that where a tenant rents premises and appurtenances thereto and nothing is reserved by the landlord and nothing said as to upon whom shall be the burden of keeping them in repair, the duty is on the tenant to keep them in repair and the obligation is solely upon him to look and see whether the premises remain in repair. But to say that a subterraneous recess under a public sidewalk is an appurtenance to the demised premises when the tenant did not know of the existence of such a recess, was not told by the landlord of its presence and there is nothing present to suggest that it actually existed, and it was not necessary to the enjoyment of the premises, and then say that the tenant was required to keep it in repair, would not comport with justice or good sense. If this coal cellarway could be said to have been an appurtenance or a part of the premises, it was the tenants's duty to keep it in repair, and if some stranger had been injured instead of plaintiff, then such stranger could have sued the tenant, although the latter neither knew or ought to have known of the existence of the coal cellarway and the opening into it.

The court on behalf of this defendant gave instructions to the jury which permitted them to find whether or not the coal cellarway was a part of the premises rented or an appurtenance thereto. These instructions were more favorable to this defendant than he was entitled. The court did not err in amending said defendant's instruction No. 2. The instruction as amended follows the law laid down in Barrett v. Bell, and other cases cited, supra.

This defendant urges that plaintiff was guilty of negligence as a matter of law. The evidence shows

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that plaintiff knew that the sidewalk, which was made of boards, was old and rickety. She had been over the place of the accident many times. The cover to the coal hole was about two and a half feet square and consisted of boards much like those used in the sidewalk, nailed together into a square that was not fastened down in any manner. This cover rested upon wooden two by fours which were shown to be badly rotted. It was the giving way of these two by fours that caused the cover to fall. The cover extended two or three inches above the surrounding boards of the sidewalk and rested upon these two by fours. There was nothing about the cover to indicate that there was a hole ten feet in depth beneath it into which plaintiff fell, nor that the two by fours were rotten, and to pedestrians it apparently presented the appearance of a patched sidewalk, or an old rickety sidewalk having a few boards placed above the others. While it was broad daylight and plaintiff knew that the sidewalk was old and rickety, there was nothing about the cover to the coal hole to indicate to her that there was a death trap concealed beneath it. Under such circumstances we cannot say as a matter of law that she was guilty of contributory negligence in using the sidewalk. It was not the sidewalk alone, but the defective coal hole and the cover in the sidewalk, and constituting a part thereof, that caused the accident.

But one instruction was given for the plaintiff, and that was on the measure of damages. However, it ended with the following sentence: "And if the jury should find from the evidence that only one of the defendants was negligent or careless, if so, that in no way bears on any liability, if any, as to the other defendant." The wording of this part of the instruction is very awkward. This defendant claims that it was error, in that, he says, it permitted a recovery against one defendant and it directed the jury that they might find for one defendant and against the other. This defendant says that if the landlord was

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guilty of any negligence, the city was likewise guilty of negligence and was primarily liable.

We do not think this objection to be well taken. The instruction was intended to tell the jury that the case of each defendant stood on its own bottom and if one were guilty of negligence that did not conclusively show that the other was guilty. The case was tried on the theory that the city was only required to discover defects that could have been seen from the sidewalk. Of course, the landlord knew of the existence of the coal cellarway, coal hole and cover and it was his duty to use ordinary care to keep them reasonably safe. The jury might well have found for the city and against the landlord.

This defendant complains of improper remarks made to the jury by plaintiff's counsel in the latter's argument of the case before them. The court sustained every objection made during the argument. There was no request on the part of said defendant that counsel be rebuked for the remarks made. Under the circumstances there was no error that this court can review in connection with the matter. [Norris v. Railroad, 239 Mo. 695; Dutcher v. Railroad, 241 Mo. 137; Stauffer v. Railway, 243 Mo. 305; Marts v. Powell, 176 Mo. App. 124.] And in connection with this point we find no evidence of passion or prejudice on the part of the jury. The evidence shows that this defendant constructed a hole in a public sidewalk ten feet in depth and then covered it with boards that he permitted to remain on badly rotted two by fours so as to make a trap for the unwary pedestrian. The case presents an aggravated case of negligence. The verdict in view of plaintiff's very severe and painful injuries was very moderate.

The judgment is affirmed. All concur.

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F. M. MEYERS, JULIAN HERNDON, SARA H. McSPADDEN and A. M. McSPADDEN, Respondents, v. J. J. WILLIAMS, WILLIAM JOHNSON, HERBERT HAWKINS, Members of the County Court of Christian County, and CLELL ADAMS, County Surveyor and Highway Engineer, Appellants.

Springfield Court of Appeals, December 20, 1917.

1. **EMINENT DOMAIN: Exercise of Right: Regularity of Proceedings.** In order to exercise the right of eminent domain under the statute, all the requirements must be substantially followed, and every jurisdictional fact must affirmatively appear on the face of the record, and nothing will be supplied by intendment or implication.

2. **HIGHWAYS: Establishment: Payment of Damages: Statutes.** The provision in R. S. 1909, sec. 10437, that petitioners for the establishment of a road shall pay into the county treasury the probable amount of damages, is jurisdictional and cannot be replaced by the filing of a bond.

3. ———: **Remedies at Law: Irreparable Injuries: Insolvency.** Failure of petitioners for the establishment of a road to pay into the county treasury the probable amount of damages, as prescribed by R. S. 1909, sec. 10437, is ground for injunction; it not being necessary to show insolvency.

Appeal from Christian Circuit Court.—*Hon. Fred Stewart,* Judge.

AFFIRMED.

William L. Vandeventer for appellants.

G. Purd Hays for respondents.

FARRINGTON, J.—The respondents filed their petition in the circuit court asking that the county court and county surveyor and highway engineer be enjoined and restrained from entering the lands of the respondents and from in any manner going upon their lands to locate and establish a public road.

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The petition states that one W. A. Aven and others, more than twelve freeholders of Christian county in this State residing within the township, petitioned for a public road; that respondents are the owners of lands over which the road would go; that the appealing members of the county court as a court heard the evidence as to probable damages to landowners and made an order that the petitioners for the road pay into the county treasury the sum of $300 as the probable damages to landowners over whose land the road would go, and contained in the order a direction to the county surveyor and highway engineer to make a survey and report when the damages were paid into the treasury. The petition for an injunction further states that the appellants were proceeding and were about to proceed without requiring the said deposit of $300 and that respondents are without adequate remedy at law, and that the county court is not liable in damages for any act concerning the proposed establishment of said road.

The answer was a general denial.

The records of the county court were introduced in evidence showing that the proceedings to establish said road were regular until the first day of January, 1917, on which date the county court made another order setting aside its former order that $300 be paid in as probable damages, requiring in lieu thereof that the petitioners for the road file a good and sufficient bond to pay all costs and damages assessed, and again ordering the county surveyor and highway engineer to survey the route and make a report.

Appellants in their brief here stand squarely on a question going to the formality of the petition which asks injunctive relief, and cite a number of cases in injunction proceedings where courts have held there must be a showing of insolvency on the part of those who are about to commit trespass or waste or irreparable injury. It is sufficient to say that these cases are inapplicable here as our courts have held that in order to exercise the right of eminent domain under the statute all the requirements must be substantially

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followed and every jurisdictional fact must affirmatively appear on the face of the record and that nothing will be supplied by intendment or implication. [Jones v. Zink, 65 Mo. App. l. c. 412.] The statute, section 10437, Revised Statutes 1909, provides that the petitioners shall pay into the county treasury the probable amount of damages to the use of the owners of the land, and that then the court shall make an order requiring the highway engineer to view, survey and mark out the road. This is a requirement which must be complied with in order to give the county court and highway engineer jurisdiction in such matters. And, as before stated, the county court in this case ordered the road to be surveyed and report made merely upon the filing by the petitioners for the road of a bond for the payment of damages. Such a proceeding does not comply with the statute which requires that a deposit of money be made in the treasury.

It is held in the case of Harris v. Township Board, 22 Mo. App. 462, that in cases of this character it is not essential that the injury threatened shall be irreparable to warrant a resort to injunction and that it is not necessary in such cases to allege that the defendant is insolvent as the injuries in a legal sense are irreparable. [See also, Carpenter v. Grisham, 59 Mo. 247, l. c. 251.]

It follows that the county court in failing to comply with the statute in the matter of requiring the probable damages to be paid in money to the treasury had no jurisdiction or authority to order the surveyor and highway engineer to survey the road, and the judgment of the circuit court making the temporary injunction permanent is affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

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T. J. DOUGLASS, Appellant, v. W. T. RAY, Respondent.

Springfield Court of Appeals, December 20, 1917.

1. **COURTS: Jurisdiction of Missouri Court of Appeals: "Suit Requiring Construction of Revenue Laws."** A suit by a former county collector of revenue against his successor in office to collect four per cent commission on delinquent taxes paid the latter, but for which suits had been instituted by the former collector while still in office, is not a "suit requiring a construction of the revenue laws" within Const., art. 6, sec. 5, as amended in 1884, placing such matter within the jurisdiction of the Supreme Court, and the Court of Appeals has jurisdiction.

2. **TAXATION: Collection: Commissions on Delinquent Taxes: Statute.** A county collector of revenue who had brought suits for delinquent taxes was entitled to the four per cent commission thereon, though the taxes were received by his successor in office.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED AND REMANDED (*with directions*).

L. R. Jones for appellant.

John T. McKay for respondent.

FARRINGTON, J.—This suit is by T. J. Douglass, formerly collector of revenue of Dunklin county, against W. T. Ray, his successor in office, to collect four per cent commission on delinquent taxes paid the latter but for which suits had been instituted by Douglass while still in office. Appellant contends that he is entitled to receive the full four per cent commission under his construction of certain sections of our revenue laws, to-wit, sections 11481, 11484, 11486, 11488, 11489, 11490, 11491, 11493, 11494, 11495, 11497, 11498, 11505 and 11511, Revised Statutes 1909, and Session Laws 1913, page 322, section 3, and the issue is sharply

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drawn by respondent's denial of the construction contended for.

We were first impressed with the idea that to dispose of this case required a construction on our part of the revenue laws so as to vest the jurisdiction of this appeal in the Supreme Court under section 5 of the Amendment of 1884 of article 6 of our Constitution. The question, however, has been recently reviewed in the case of State ex rel. Hadley v. Adkins, 221 Mo. 112, 119 S. W. 1091, where a number of Missouri cases are discussed which hold that in order to confer appellate jurisdiction in the Supreme Court "revenue must be directly and primarily concerned, not merely indirectly or as an incident." The only case we have found where there was a disposition of the commissions due a collector on delinquent taxes wherein the Supreme Court retained jurisdiction, is that of State ex rel. Shannon County v. Hawkins, 169 Mo. 615, 70 S. W. 119. However, on reading that opinion it will be seen that the question for decision was whether the penalty of four per cent was a part of the revenue or whether it was to be treated as costs and penalty, which necessarily involved a construction of the revenue laws within the meaning of the Constitution. In our case the only question to be decided is whether this four per cent penalty—which has been held in the case last above cited not to be *revenue*—shall go to the collector who actually received the money paid by delinquent taxpayers against whom suits had been instituted by his predecessor, or whether it belongs to the collector who instituted the suits. It is clear that the jurisdiction of this appeal is with us.

The proposition as to who the four per cent belongs to has been definitely decided by the St. Louis Court of Appeals in the case of Watson v. Schnecko, 13 Mo. App. 208, and the opinion in that case answers the argument made by the respondent in the brief presented here.

It is stated in the case of State ex rel. Shannon County v. Hawkins, supra, l. c. 620, that where the

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collector collects back taxes he will be allowed certain other compensation as costs—referring to the four per cent—which the delinquent taxpayer must pay to recompense the collector for the various extraordinary steps he is required to take to collect delinquent taxes, and it is held that as to back taxes such collector should receive the extra compensation, from which it logically results that if this extra pay is given for extra labor and work it naturally should go to the man on whom the burden fell of doing the extra work. The sections of the statute above referred to impose duties on collectors with reference to back taxes, including the making out of lists, posting, filing suit and continuing it in his name by the lawyer he has appointed as tax attorney, etc. In this case the facts disclose that all the defendant (the incoming collector) did was to receive the money and to account for it when it was brought in by the delinquent taxpayers after having been sued.

We conclude that the court in the case of Watson v. Schnecko, supra, correctly declared the law, which results in our reversing this judgment and remanding the cause with directions to the circuit court to set aside its judgment and enter a judgment in plaintiff's favor for the four per cent of the taxes collected in those cases where he instituted suit prior to relinquishing his office, together with interest and costs. It is so ordered. *Sturgis, P. J.*, concurs. *Bradley, J.*, having been of counsel, not sitting.

A. L. MORGAN, Defendant in Error, v. SUNFLOWER ZINC COMPANY, Plaintiff in Error.

Springfield Court of Appeals, December 20, 1917.

1. **TRIAL: Demurrer to Evidence: Hearing and Determination.** In passing upon a demurrer to the evidence, every reasonable inference of fact arising from the evidence and tending to establish plaintiff's case is to be taken as true.

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2. **MASTER AND SERVANT: Actions for Injuries: Questions for Jury.** Where an employer had an appliance for prying or wedging apart shafts in order to tighten belts which worked on the principle of a lever requiring a man to press downward on the end of a gas pipe, and the appliance was not bolted at a place where it could slip off, and if it did slip off would permit the employee to fall to the floor, it was a question for the jury whether the manner in which the employer permitted it to be used was a reasonably safe method.

3. ———: ———: **Issues: Contributory Negligence.** Where the jury found that an appliance in the nature of a lever was not reasonably safe, and there was no affirmative plea of contributory negligence, the employer could not escape liability, unless an injured employee was guilty of contributory negligence on the theory that the danger was so apparent and glaring that no ordinarily prudent man would have placed his weight on the lever, knowing its condition

4. ———: **Liability for Injuries: Contributory Negligence.** Though an employee suspects that an instrumentality is defective, he has the right to rely on the superior knowledge of his master, and it is only where the danger is so imminent that no ordinarily prudent man would undertake the work, regardless of what the master said about it, that he is barred on account of contributory negligence in continuing to use the instrumentality after being assured by the master that it is safe to proceed with the work.

5. ———: ———: ———. Where an employee called his foreman's attention to the defect in a lever making it likely to slip, the foreman's statement that he guessed it was safe, and for plaintiff to continue pressing down on the lever, could not be construed by the employee as anything less than an assurance that his fear of danger was ill founded, and that he could safely proceed with the work.

6. **PLEADING: Matters to be Proved: Unnecessary Allegations.** Where the petition in an employee's action for injuries charged negligence concerning the defective condition of an appliance, an allegation negativing his knowledge of the dangerous and negligent condition was unnecessary and redundant, and merely anticipated the defense of contributory negligence, and did not throw on plaintiff the burden of maintaining such unnecessary allegation.

7. **MASTER AND SERVANT: Actions for Injuries: Instructions: Conformity to Issues.** Where a petition charging negligence on the part of an employer respecting the defective condition of an appliance alleged that plaintiff did not know of the defective condition, an instruction authorizing a recovery if the danger was called to the foreman's attention by the employee, and if the foreman negligently assured the employee that there was no danger, was not erroneous as changing the issue made by the pleadings,

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as the foreman's order and his failure to warn the employee was material only as negativing contributory negligence.

8. ———: **Liability for Injuries: Time and Opportunity for Discovery of Defects.** Where an employer's negligence consisted in ordering an employee to proceed with a negligently constructed appliance after knowledge of the defective condition of the appliance had been brought home to the foreman giving such order, the right of the employer to a reasonable time within which to discover the defect and repair it did not arise.

Error to Jasper Circuit Court.—*Hon. R. A. Pearson*, Judge.

AFFIRMED.

Sheppard & McCammon for plaintiff in error.

Wolfe & Burnett for defendant in error.

FARRINGTON, J.—The plaintiff in error comes to this court complaining of a judgment for $700 against it in a suit filed by the defendant in error on account of personal injuries based on a petition alleging negligence on the part of the plaintiff in error is not furnishing a reasonably safe and suitable appliance with which it ordered the defendant in error to work as its employee. A part of a finger and the bone in one thumb were lost on account of the injury and no claim is made that the verdict is excessive.

I. It is first contended that the trial court erred in refusing an instruction directing a verdict in the defendant's favor at the close of the trial. This requires a brief statement of the plaintiff's evidence, in approaching which, the rule should be stated that in passing upon a demurrer to the evidence every reasonable inference of fact arising from the evidence is to be taken as true which tends to establish the plaintiff's case. [Hall v. Manufacturers Coal and Coke Co., 260 Mo. l. c. 365, 168 S. W. 927.]

Without going into detail it is sufficient to say that the plaintiff's evidence shows that he was an employee

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of the defendant working under the direct personal observation of its foreman; that defendant had an appliance by which it tightened certain belts in its mill by prying or wedging apart the shafts; that the appliance worked on the principle of a lever which required a man to take hold of the end of a gas pipe and press downward; that this appliance was not bolted at a place where it could slip off, and that if it did slip off at the time an employee was bearing his weight on the end of the lever—which was a gas pipe—it would permit him to fall to the floor of the mill; that plaintiff noticed it was slipping and that there was only about an inch left upon which it would be held up; that he called the attention of defendant's foreman to it, and that the foreman looked at it and said he would bolt it but that he guessed it would hold in order to tighten the shaft, and thereupon ordered the plaintiff to press down on the gas pipe so that a wedge might be driven in to hold the machinery apart, which wedge was driven or started to be driven by the foreman.

The charge of negligence in the petition was that defendant had negligently and carelessly failed to have the board or plank securely fastened, and that it had been in that condition for a long time, and that defendant knew of the same or could have known by the exercise of ordinary care. It is further alleged that plaintiff exercised reasonable care in the performance of his work, to which allegation we will refer in discussing an instruction.

The plaintiff in error charges that the condition of this appliance was open and obvious, that it was known to the plaintiff, and that a man of ordinary prudence would not have continued to remain in the position in which plaintiff was knowing that the lever upon which his entire weight was resting was liable to slip at any time, citing Trainer v. Sphalerite Mining Co., 243, Mo. 359, 148 S. W. 70. The facts of that case are easily distinguished from those in our case. There the servant was furnished with a num-

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ber of pieces of dynamite to be used by himself. There was no request made for another piece of dynamite, to be used in place of the one he did use, nor was there any assurance or direction on the part of the master to use the particular piece which injured him. In the case at bar the evidence of plaintiff shows that he did know or suspect that the lever was likely to slip off which would permit him to fall with his weight on the end of it, and he called the attention of the defendant's foreman to this condition who looked at it and told him he guessed it would hold and to press down on it. It was for the jury to say whether the manner in which the defendant permitted this lever to be used was a reasonably safe method. The jury having found that it was not a reasonably safe method, but negligent, the only escape from liability under the Missouri decisions would be that plaintiff was guilty of contributory negligence on the theory that the danger was so apparent and glaring that no ordinarily prudent man would have placed his weight on the lever knowing its condition, there being no affirmative plea of contributory negligence. And in passing on this question it will not do to say that a servant is guilty of contributory negligence as a matter of law because he suspects that an instrumentality is defective and dangerous and continues to use it after he has been assured by the master that it is safe to proceed with the work; he has a right to rely on the superior knowledge and judgment of his master; and it is only in those cases where the danger is so imminent that no ordinarily prudent man would undertake the work regardless of what the master said about it that he is barred on account of contributory negligence. An instruction embodying the above declaration of the law was approved in Swearingen v. Consolidated Troup Mining Co., 212 Mo. 524, 111 S. W. 545. In the case at bar plaintiff showed that some twenty minutes before he was ordered to press down on this lever he had called the foreman's attention to the defect which did in fact injure him later. By the foreman then say-

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ing that he guessed it was safe and ordering plaintiff to press down on the lever could be construed by no servant whose duty it is to obey his master as anything less than assurance that his fear of danger was ill-founded and that he could safely proceed with the work. The following cases involve questions kindred to the one under discussion: Duerst v. St. Louis Stamping Co., 163 Mo. l. c. 621, 622, 63 S. W. 827; Hall v. Manufacturers Coal and Coke Co., 260 Mo. 351, 168 S. W. 927; Erwin v. Missouri & Kansas Tel. Co., 173 Mo. App. 508, 158 S. W. 913; Bliesner v. Riesmayer Distilling Co., 174 Mo. App. 139, 157 S. W. 980; Goode v. Central Coal & Coke Co., 167 Mo. App. 169, 151 S. W. 508. We therefore hold that under the facts stated the plaintiff should not be barred from recovering on account of contributory negligence as a matter of law and that the court committed no error in overruling defendant's instruction directing a verdict.

II. It is urged that the first instruction given for the plaintiff submitted an entirely different issue from that counted on in the petition. It is claimed that this instruction casts liability on the defendant if the jury found that the possibility of the slipping of the timber was suggested to the foreman and that the foreman negligently assured plaintiff the timber would not slip—the point being that the petition charges that plaintiff did not know of the defective condition of the appliance and that defendant did know of it or could have known of it by the exercise of reasonable care and failed to warn plaintiff, whereas plaintiff's evidence discloses that the appliance was in a condition that made him question its safety to the extent of causing him to call the foreman's attention to the defect.

The petition contained a sufficient charge of negligence concerning the defective condition in which the master had permitted this appliance to become, and the knowledge or ignorance of plaintiff of this condition would arise on a plea of contributory negligence.

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[Hall v. Manufacturers Coal and Coke Co., 260 Mo. l. c. 358, 168 S. W. 927.] Plaintiff merely anticipated such a defense by inserting in his petition the unnecessary and redundant allegation that he did not know of the dangerous and negligent condition. Because the plaintiff in a personal injury suit negatives the fact that he was guilty of contributory negligence does not throw the burden on him of maintaining such unnecessary allegation. [Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; Hudson v. Wabash Western Ry. Co., 32 Mo. App. 667; s. c., 101 Mo. 13, 14 S. W. 15.] The charge in the petition and the finding to be made in the instruction was as to whether the condition the appliance was left in was a negligent act, and under the facts of this case where the foreman assured plaintiff that it was safe and ordered him to use it, the further finding in the instruction relating to the order of the foreman and the failure to warn plaintiff became material only as negativing contributory negligence and certainly does not change the issue made by the pleadings and sustained by the evidence. As before stated, the fact that plaintiff knew that the appliance was, in a way, defective, did not charge him with knowledge that it would be negligence to use it, and this especially where he was assured by the foreman that it was safe.

III. It is next urged that the first instruction is erroneous in that it does not require the jury to find that the defect was known in time, by the exercise of ordinary care, to have prevented the slipping. There are cases where such finding is necessary but they are not cases where the foreman's attention was called to the defect and he pronounced the appliance reasonably safe. The negligence consisted, when he did know of it, in ordering the plaintiff to proceed with a negligently constructed appliance—the knowledge having been brought home to the foreman; and the right of the defendant to insist on a reasonable time within which to discover a defect and repair it cannot arise

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in a case wherein it is shown that the defect is known to the master before the order is given to use it in the known defective condition.

Finding no error in the record, the judgment is affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

VILLAGE OF NIXA to the use of J. B. McMULLEN, Respondent, v. H. M. WILSON, Appellant.

Springfield Court of Appeals, December 20, 1917.

1. **TAXATION: Poll Taxes: Demand and Refusal to Pay.** Where, on being asked to pay his poll tax by the street commissioner of the village, defendant replied: "To hell with the poll tax. He didn't pay no poll tax in the village of Nixa"—his answer was sufficient to show that a demand had been made and was refused.

2. **APPEAL AND ERROR: Record: Matters Presented for Review.** In a suit to collect a poll tax, a contention based on the fact that the village marshal was also street commissioner and collector would not be considered, where there was no mention of such question in the record proper or bill of exceptions.

3. **MUNICIPAL CORPORATIONS: Ordinances Levying Taxes: Validity.** Under Revised Statutes 1909, sec. 9447, providing that the board of trustees, of a town or village shall, from time to time, provide by ordinance for the levy and collection of poll taxes, an ordinance levying a poll tax of $3 on all male inhabitants of the village, and which, it was claimed, was merely a levy for the current year, was sufficient to justify the tax, though based on no general ordinance on the subject of poll taxes.

4. ———: **Ordinances: Effect of Partial Invalidity.** Where a general ordinance in section 1 provided that all able-bodied male persons between the ages of 21 and 60 should be liable for the poll tax, and in section 4 defined the duties of the street commissioner in the collection of poll taxes, the invalidity of section 1 under Revised Statutes 1909, sec. 9447, which only grants power to levy a poll tax on citizens between 21 and 50, did not render the whole ordinance invalid.

Appeal from Webster Circuit Court.—*Hon. C. H. Skinker*, Judge.

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AFFIRMED.

Barrett & Moore for appellant.

No Brief filed for respondent.

FARRINGTON, J.—This legal entanglement grows out of the refusal of the defendant to pay his three dollar poll tax to the village in which he resided levied for the year 1915. The cause originated in a justice court from which it went on appeal to the circuit court where the plaintiff village prevailed, and the defendant comes here complaining of error.

The evidence discloses that defendant was forty-eight years of age when the 1915 levy was made.

A question of fact was raised in the circuit court on the character of the notice and demand made by the village authorities on the defendant, but that question is put at rest as the court clearly defined the issue and the law in this connection in instructions 1 and 2.

Plaintiff's evidence shows that the street commissioner, acting under section 4 of ordinance No. 17, demanded payment of the poll tax of defendant, telling defendant he wanted to do some work on the road, and that defendant answered, "To hell with the poll tax. He didn't pay no poll tax in the village of Nixa." The answer alone is sufficient to show that a demand had been made and was refused.

Some question is raised in appellant's brief about the marshal of the village holding three offices, to-wit, marshal, street commissioner, and collector. This is a belated contention as no mention of it is contained in the record proper or bill of exceptions.

The nearest approach to a meritorious point raised by the appellant is that the whole proceeding is void because the ordinance under which the village was acting is void. The village on March 11, 1915, passed the following ordinance (No. 34):

"An Ordinance Relating to Poll Tax for the Year 1915.

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"Be it ordained by the Board of Trustees of the Village of Nixa, Nixa, Missouri, as follows:

"Sec. 1. That a poll tax of $3 be and is hereby levied on all able-bodied male inhabitants in the village of Nixa, Mo., over *21* and under *50* years of age.

"Sec. 2. That said poll tax may be paid in money or labor.

"Sec. 3. This ordinance shall be in full force and effect from and after its passage and approval of the Chairman of the Board of Trustees.

"Passed this the 11th day of March, 1915.

"Approved by the Chairman of the Board March 11, 1915."

This ordinance was introduced in evidence followed by the introduction of section 4 of ordinance No. 17, which defines the duties of the street commissioner in the collection of poll taxes, and then there was introduced the motion carried by the Board of Trustees ordering the village marshal to bring this suit.

Appellant contends, in the first place, that ordinance No. 34 is merely a levy for 1915 which must be based on a valid general ordinance, and then points to section 1 of ordinance No. 17 which reads as follows:

"All able-bodied male persons between the ages of *21* and *60* years who have resided within the corporate limits of this village 30 days next preceding the levy of any poll tax, for any fiscal year, shall be liable to the village for poll tax for the purpose of improving the streets, alleys and highways of this village."

It will be seen that the section just quoted designates those who are liable for a poll tax to be between *21* and *60* years of age, whereas section 9447, Revised Satutes 1109, grants only to villages the power to levy and collect a poll tax from citizens who are between *21* and *50* years of age.

The answer to this contention is that the passage of ordinance No. 34 is all that is needed to justify this tax as section 9447, Revised Statutes 1909, clearly indicates that such ordinances shall be passed "from

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time to time," and hence the ordinance making the levy requires no general ordinance as a basis. Ordinance No. 17 is certainly valid in all respects except as to section 1 thereof. It is trite law that "where the provisions of a statute or ordinance are severable and are not interdependent one upon the other, the whole will not be declared void because a part is invalid, but the void portions will be eliminated and the valid parts upheld and enforced, provided, this will not defeat the substantial object of the enactment." [St. Louis v. Grafeman Dairy Co., 190 Mo. l. c. 503, 89 S. W. 617, citing St. Louis v. Railroad, 89 Mo. 44, 1 S. W. 305, City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202, State v. Clarke, 54 Mo. 17, and State v. Bockstruck, 136 Mo. 335, 38 S. W. 317.] It is held in State v. Bockstruck, last above cited, that a part of a law may be constitutionally invalid and the remainder of it valid, where the objectionable part may be properly separated from the other, and this is so although the valid and the invalid may be contained in the same section. [See also, City of St. Louis v. Waterloo-Carondelet Turnpike Co., 14 Mo. App. 216.] Therefore, after eliminating section 1 of ordinance No. 17 there is ample foundation upholding the suit for this poll tax. The judgment is affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

MRS. H. A. TIFFANY, Respondent, v. QUEEN INSURANCE COMPANY OF AMERICA, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **INSURANCE: Acceptance of Policy: Conditions.** The acceptance of a fire policy is equivalent to a declaration that a provision in the policy that insured was the sole owner was true, although insured never saw the policy or signed an application.

2. **———: Defenses: Issues.** Although an insurer answered that a policy was absolutely void because insured was not sole owner, but only had a dower interest, the court properly refused to sustain a

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demurrer to the evidence which would give plaintiff nothing, where the insurer tendered a certain amount in court as being sufficient to cover insured's interest in the property.

3. ———: **Conditions in Fire Policy: Waiver: Estoppel.** Evidence *held* sufficient to warrant a finding that a fire insurance company's agent knew that insured only had a dower interest in a house, and that the company waived and was estopped to set up a defense that she was not sole owner; the agent having himself made out the application, which was not signed by insured.

4. **TRIAL: Issues: Instructions.** Where an insurance company admitted liability in some amount, and made a tender in court, the court properly refused to instruct that offers of compromise should not be construed as an admission of liability "in any amount."

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker,* Judge.

AFFIRMED.

L. R. Jones for appellant.

Phillips & Cox for respondent.

FARRINGTON, J.—Action on a fire insurance policy for $800, the face amount, with ten per cent thereof for vexatious delay, and asking an attorney's fee. The jury returned a verdict for $700 on the policy, together with $50 for vexatious delay and $50 as an attorney's fee. The circuit court overruled defendant's motion for a new trial only after plaintiff had agreed to remit the two sums last above mentioned, and the appeal is from the judgment for $700.

There is little dispute as to the law governing this appeal. The difference arises from opposite views as to the effect of certain facts.

The policy was on a dwelling house standing on a lot in Malden, Mo. In January, 1906, this property had been conveyed by one Pearson to H. A. Tiffany who, with his family, resided in the house until he died in May, 1909, after which his widow, the plaintiff, lived there.

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Davis & Morris were the agents at Malden of the defendant company both having resided there as insurance agents for many years. For some reason, unexplained, Davis was not a witness at the trial.

H. A. Tiffany, owner of the property, died in 1909. In 1910, Davis & Morris, as defendant's agents, issued a fire policy on the dwelling on this lot in the name of H. A. Tiffany to run three years, knowing he was dead. When that policy expired Mrs. Tiffany was visiting in Oklahoma. She testified that Davis & Morris notified her the policy had expired and that she "wrote them and told them to reinsure at what she could collect if the house should burn and no more." This letter was not introduced in evidence. Davis then wrote her stating that the policy was written in the sum of $800 and that the premium was $12, which she paid by check. The renewal policy was written in the name of Mrs H. A. Tiffany. A year later the fire occurred.

In the petition the plaintiff in setting forth her interest in the dwelling alleged that it was "then and now owned by this plaintiff as her homestead and with a dower right thereon."

In the answer, among others the defense was made that the insurance policy sued on provided that if the interest of the assured be or become other than the unconditional, unincumbered and sole ownership of the property, or if the building insured be on ground not owned by the assured in fee simple, the policy would be void; that at the time the policy was issued and at all times since the plaintiff only owned a dower interest which was the extent of her insurable interest; that at the time of the issuance of the policy plaintiff represented that she owned a fee simple interest (of which, we may say here, there is no proof); and that the valuation and permitted insurance as contained in the policy was placed under the belief that plaintiff's insurable interest was that of fee simple owner, and that had the facts been known defendant would not have issued this policy.

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Plaintiff in her reply pleaded estoppel of the defendant to set up the foregoing defense because of the fact that Davis & Morris, its agents, with full knowledge that Tiffany was dead, and that plaintiff was his widow living in said dwelling, issued a policy on this house in 1910 in the name of H. A. Tiffany, and that on its expiration in September, 1913, they issued the policy in question; that they issued this policy in the name of Mrs. H. A. Tiffany of their own volition with full knowledge of the condition of the title and collected of her the premium.

Defendant's contention is that plaintiff wholly failed to prove the estoppel pleaded in her reply and that its demurrer to the evidence should have been sustained. Defendant concedes that Davis & Morris had power to waive a condition that would vitiate the policy provided they had knowledge of the breach of the condition at the time.

As stated, there is no proof whatever that plaintiff made any representations as to the extent of her interest in this house. She merely wrote Davis & Morris to reinsure at what she could collect if the house should burn and no more. It appears that Davis was an employee in a bank at Malden with which the Tiffany family did business and at which the deed was kept. She testified: "Q. Will you tell the jury who was the custodian of the deed that has been offered in evidence today at the time that insurance was taken out" (referring to the policy issued in 1910 as will presently appear)? "A. It was in the safe at the Dunklin County Bank. Q. Did Mr. Davis have any knowledge of it? A. Yes, sir, he unlocked it and gave the deed to Mr. Morris and I told him when he got through with the deed to put it back" (which shows that she must have been referring to the time the 1910 policy was issued because she went to Oklahoma in May, 1913, and did not return until January, 1914, and the policy sued on was issued September 29, 1913.) "Q. You say Mr. Davis knew of the conditions of it when the first policy

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of insurance was taken out in Mr. Tiffany's name? A. Yes, sir."

Morris, called as a witness by the plaintiff, testified that he was not personally acquainted with H. A. Tiffany and thought he was alive when the first policy was issued. He could not recall writing the first policy, and did not remember whether or not he had ever seen the deed, but did not know how he could have gotten the description if he had not had the deed, and he "judged from looking at the policy and noting the description that he would have had to have some other instrument to get the description from." He also testified that at the time the policy sued on was issued Mrs. Tiffany was not in Malden, and that he and Davis issued this policy. Also: "Q. You are an attorney at law and were at the time this policy was issued? A. Yes, sir. Q. And you were acquainted with the title to that piece of property, were you not? A. I was not. I was not, no, sir, legally. Q. Will you state to the jury since you issued the policy from September, 1910, to September, 1913, in the name of H. A. Tiffany, why did you issue this policy in the name of Mrs. H. A. Tiffany? A. That is a question that I can't answer for this reason: There was a lapse between the issuance of these two policies. There had been an expiration of the policy in the name of H. A. Tiffany. I find reference only to the record, and Mrs. Tiffany not being in Malden, Mr Davis informed me he had a letter from Mrs. Tiffany requesting the issuing of a new policy. I wrote up this policy here purporting to be the insurance on the dwelling in question and delivered it to Mr. Davis in the name of Mrs. Tiffany. It was the intention to deliver the policy to Mrs. Tiffany. She left her papers in the bank, and I gave it to Mr. Davis to deposit." The witness then went on to state that he wrote the policy based on fee simple ownership, believing she owned it absolutely—and this was as far as the evidence went on that phase as defendant's evidence was silent concerning that issue—but in passing on the demurr · to plaintiff's evi-

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dence only such evidence is to be considered as is favorable to the plaintiff.

Though it does not appear that plaintiff ever saw this policy previous to the fire, this would make no difference. The acceptance of the policy with such provision as that contained in the policy before us was equivalent to a declaration that such facts were true. [Mers v. Insurance Co., 68 Mo. 127; Terminal Ice & Power Co. v. American Fire Ins. Co.,—Mo. App.—, 194 S. W. 722, l. c. 724.] A parallel case on the facts, but absent the question of waiver, is that of Overton v. American Central Ins. Co., 79 Mo. App. 1. In that case, as in this, there was no written application and nothing was said by either party as to title. The policy contained a similar provision. It appears from appellant's brief in the case that the interest of the plaintiff was as owner of a homestead right, the property having belonged to her husband and descended to his heirs as in our case. The court held that putting the policy away without reading it amounted to a declaration that the title was as stipulated in the policy. The insurance agents in that case likewise acted on their own initiative in inserting the name of the plaintiff as the assured. But a sentence in that opinion shows there was no evidence in that case that the agents knew the true state of the title.

Our case is governed by such decisions as that in O'Brien v. Greenwich Ins. Co., 95 Mo. App. 301, 68 S. W. 976, and La Font v. Home Ins. Co., 193 Mo. App. 543, 182 S. W. 1029.

Defendant at no time had insisted on a forfeiture of all rights under the policy. Though in its answer it set up the fact that plaintiff had only a dower interest in the property, and the policy provision that if the interest of the assured be or become other than the unconditional ownership of the property or if the building be on ground not owned by the assured in fee simple, the policy would be void, yet this is followed by a tender of $433.30 into court for plaintiff as defendant's view of the amount she was entitled to recover;

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and throughout the trial defendant renewed this tender. Manifestly, in view of this plea and this attitude it would have been error for the court to have sustained its demurrer to the evidence which would have been a direction to the jury to find that plaintiff was not entitled to recover anything.

But the contention that plaintiff wholly failed to sustain by evidence her plea of estoppel is also pressed by defendant in its contention that the circuit court erred in giving plaintiff's instructions 1 and 3 which permitted the jury to pass on the question whether defendant's agents were acquainted with the title of the property in transacting defendant's business.

It is certainly fair to infer that in 1910, in transacting business for the defendant, Davis & Morris took the deed from Pearson to H. A. Tiffany out of the bank in order to obtain the description of the property to be inserted in the policy that was then issued in the name of H. A. Tiffany, and that Morris, an attorney, had the deed before him when that policy was written; also, according to plaintiff, that Davis was well acquainted with the plaintiff and knew her husband was dead and worked at the bank where the Tiffany family did business and "that he knew the conditions of it" when the first policy was issued; and that the policy sued on was issued by Morris in the name of Mrs. H. A. Tiffany and passed into the hands of Davis who was to deposit it in the bank. With no representations whatever from plaintiff as to the nature of her interest these agents issued a policy in her name in the sum of $800 after having been told to insure at what plaintiff could collect if the house should burn and no more. The fact is that the issuance of a policy for $800 in her name resulted. The act of Morris, who claimed he did not know Tiffany was dead, in changing the name of the assured from H. A. Tiffany to Mrs. H. A. Tiffany may have had some weight in leading the jury to believe that he had made inquiry as to the extent of her ownership, and that $800 was the value of that ownership in his judgment. At any rate, there is some evidence

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that these agents while transacting business for the defendant at one time knew that the deed to the property, which was considered valuable enough to be kept locked up at the bank—indicating to the ordinary mind that it evidenced the last transfer of title—was in the name of H. A. Tiffany, and that at least one of the agents who handled the policy in question knew at the times both policies were issued that H. A. Tiffany was dead, from which we hold it could reasonably be inferred that they had knowledge of the condition of the title at the time they of their own volition issued the second policy to the plaintiff.

Though we have disposed of the contention presented, to-wit, the question of waiver, the fact is that the reply of the plaintiff pleaded estoppel, not waiver, so that it may not be amiss to refer to the criticism offered by the St. Louis Court of Appeals in Nixon v. Insurance Co., 69 Mo. App. l. c. 357, of opinions in this character of cases which are put on the ground of waiver, saying they should be decided on the principle of estoppel—that is, that the insurance agent in filling up the application acted as the agent of the insurer and that the latter is precluded from denying what its agent once asserted. [See Thomas v. Insurance Co., 20 Mo. App. 150; Franklin v. Insurance Co., 42 Mo. 456.]

Defendant complains of the refusal of its third instruction which told the jury that all testimony offered by plaintiff as to offers of compromise in this suit made by defendant shall in no way be construed as an admission by defendant that defendant was liable to plaintiff on the policy sued on in any amount. The last three words in the instruction—"in any amount"—justified the court in refusing the instruction because the defendant from the time the loss occurred admitted liability in some amount, and in the answer and throughout the trial tendered an amount which it contended plaintiff was entitled to receive under the policy.

Defendant complains of the giving of an instruction which merely defines "totally destroyed" and

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"total loss" (and we may say that the definition given was correct), and of the giving of an instruction which permitted the jury to find that there was a total loss, because, the defendant says, there is no evidence upon which the jury could find that the house was totally destroyed. Without going into detail we hold that there was ample evidence upon which to base a finding that there was a total loss as defined in the instruction.

The judgment is affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

J. L. BAKER, Respondent, v. J. W. LUSK, et al., Receivers of the ST. LOUIS and SAN FRANCISCO RAILROAD, Appellants.

Springfield Court of Appeals, February 6, 1918.

1. **MASTER AND SERVANT: Injury to Servant: Assumed Risk.** A railroad section hand replacing old with new ties assumed the risk of stumbling over fence posts scattered along the right of way and concealed by grass and weeds.

2. ———: ———: **"Assumption of Risk."** By assumption of risk is meant that the servant assumes all of those incidents and customs which ordinarily exist in the work in which he is concerned.

3. ———: ———: **Negligence.** That section hand replacing old with new ties in defendant's railroad track stumbled over fence posts scattered along the right of way and covered with grass did not show negligence of defendant.

Appeal from Pemiscot Circuit Court.—*Hon. Sterling H. McCarty*, Judge.

REVERSED.

Evans & Mozley for appellants.

Ward & Reeves for respondent.

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FARRINGTON, J.—The plaintiff recovered a judgment against the defendants on account of personal injuries sustained while working as a section hand on defendant's right-of-way repairing the railroad track, and defendants have appealed.

The charge of negligence is that the defendants failed to exercise ordinary care in furnishing plaintiff with a reasonably safe place in which to work.

The facts are that defendants had prior to the time of the injury scattered along the right-of-way in the country some railroad ties, having thrown them down the embankment some ten or fifteen feet from the rails. They also had at some prior time scattered some fence posts along the right-of-way, put there for the purpose of repairing the railway fence. Plaintiff was a grown man and had worked nine days as a section hand for the defendants. Stating plaintiff's case from the most favorable evidence to him, he with some other section men were working under a foreman or section boss taking out old ties from beneath the rails and putting in the new ties that had been scattered along the right-of-way. Plaintiff was ordered by the foreman to bring the ties from where they had been thrown up to the track to replace the ties taken out. There was no particular order or direction to bring this particular tie which fell on and injured him. At the place plaintiff was working when injured the track was on a fill about three or four feet high, and the ties that he was working with had been thrown away from the track some ten of fifteen feet. He and a fellow-workman went to carry this tie up to the track and were toting it in the ordinary way. It appears that the grass and weeds which had grown along the right-of-way had covered up and obscured from view the fence posts or a fence post over which plaintiff had to travel in order to take the tie up to the track and which caused him to stumble or to slip and fall, thereby causing the tie to fall on and injure him. He therefore complains that defendants were negligent in permitting this post to be on the right-of-way where

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he was placed to bring the ties to the track and that by reason of such negligence he was injured.

As we view this case it rides off on a well-grounded principle of law which has been stated in the case of Piorkowski v. Leschen & Sons Rope Co., 190 Mo. App. l. c. 603, 176 S. W. 258, as follows: "Defendant cannot be held liable for failure to warn plaintiff under the circumstances attending plaintiff's injury. Where the danger is an extraordinary one, i. e., not ordinarily incident to the service, and the master has knowledge thereof, he is guilty of negligence if he fails to warn the servant of such danger; but where the danger is clearly obvious to any one and is one merely incident to the service, there is no duty to warn the servant thereof except where the latter has not reached the years of discretion." [See also, Braden v. Railroad, 174 Mo. App. l. c. 587, 161 S. W. 279; Roberts v. Telephone Co., 166 Mo. l. c. 378, 66 S. W. 155; Nugent v. Kauffman Milling Co., 131 Mo. 241, 33 S. W. 428.]

It is a matter of common knowledge to every one who knows anything about a railroad track and right-of-way that the right-of-way is used by railroad companies as a place where they may scatter ties and fence posts for the purpose of maintaining and operating the road and that in the ordinary and natural course of events the grass and weeds will at times grow up around such ties and posts and obscure them before the actual work of putting them in takes place.

It is also common knowledge that the right-of-way of a railroad track cannot be kept perfectly level and absolutely safe for those hired by it to maintain the road to work on and walk over.

We are not dealing in this case with a master who is maintaining a yard or some place where he requires and directs his employees to continually be walking over and across, but are dealing with a case where the particular work being done with reference to this tie and this fence post was isolated and temporary only. To require railroad companies to see that a paved way or absolutely

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smooth walk is provided from every place they throw a tie along the railroad right-of-way to replenish the road in order that the section men may have such a walk or smooth way over which to pack the ties would render the operation of railroad impracticable.

This was clearly a risk which plaintiff assumed when he entered this service. By assumption of risk is meant that the servant assumes all of those incidents and customs which ordinarily exist in the work with which he is concerned. He does not have to know of or see every fence post or tie or rock or ditch or hole that may be along the railroad right-of-way over which he is ordered to walk and work, and because he does not see each particular and isolated obstruction or danger that may be lurking there makes it no less a risk concerning which he knows and has knowledge of and assumes because it is common knowledge to every one that such obstructions and defects and unlevel places are there by the very nature of things and by the very efficient operation of the work. The case falls clearly within the category of an accident rather than that of negligence.

It must be shown in order to recover in such a case that the master knew that the danger existed, which was shown in this case, but it must also be shown that the very presence of the thing complained about carries the idea of danger to the extent of awakening such idea in the mind of an ordinarily careful person. We say that the fact that a fence post thrown out on a railroad right-of-way with which to repair the fence would not awaken in the mind of a reasonably prudent person the idea that it was dangerous to leave it there because a section foreman might at some future time order one of his section hands to bring a tie to the track which might or would cause such workman to pass over the place where the post was left and be injured. [See, Starkey v. City of Greenville, 189 Mo. App. 352, 175 S. W. 314; Wilt v. Coughlin, 176 Mo. App. 275, 161 S. W. 888; Badgley v. St. Louis, 149 Mo. l. c. 133, 50 S. W.

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817; Braden v. Railroad, 174 Mo. App. 584, 161 S. W. 279; Williams v. Railroad, 119 Mo. 316, 24 S. W. 782; 3 Elliott on Railroads, sec. 1272.]

This case is not to be confounded with those cases where the master prepares or undertakes to prepare a regular place for his servants to perform their work, such as a tie yard or wood yard or other place where there is continuous and constant passing over by employees. It falls in the class of isolated temporary employment where what was done is the ordinary and usual thing done from which no reasonably prudent person would anticipate the danger which caused the injury.

The judgment is reversed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

J. L. DIFFENDERFFER and MORGAN STOKES, Respondents, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **COURTS: Decisions of United States Courts as Controlling.** In determining the liability of a telegraph company on account of negligent delay in the transmission of an interstate message, the law must be construed as it has been construed by the federal courts touching the question.

2. **TELEGRAPHS AND TELEPHONES: Transmission: Delay: Recovery.** In an action for negligent delay in the transmission of a telegram, it appeared that the message was written on a blank, reciting on its face that the message was sent subject to the terms on the back. The back of the blank contained recitals stating that to guard against mistakes and delays the message should be repeated, and that it was agreed that the company should not be liable for mistakes or delays or for nondelivery of any unrepeated message beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, nor for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured. There was no averment that a special value was placed on the telegram. *Held*, that as the conditions placed no value on the message, the value thereof might be fixed by the jury.

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3. ———: **Transmission of Messages: Delay.** That the receiving agent of a telegraph company not knowing the closing hours at the terminal office, and merely contracting to transmit and deliver the message according to the rules of the company, failed to notify the sender that the terminal office was closed does not make the company liable for delay in delivery of the message, resulting from the fact that the terminal office was closed when it was sent.

Appeal from Laclede Circuit Court.—*Hon. L. B. Woodside*, Judge.

REVERSED AND REMANDED.

Benedict & Curry for appellant.

Mayfield & Son for respondents.

FARRINGTON, J.—The plaintiffs (respondents) recovered a judgment against the defendant in the sum of $300 on a cause of action based upon a petition asking special damages alleged to have been sustained by reason of a negligent delay in the transmission and delivery of a telegram. The message was sent from National Stock Yards, Illinois, to the plaintiffs at Lebanon, in this State. It was, therefore, an interstate message and the law governing any recovery thereon must be construed as it has been construed by the Federal courts touching the question.

Plaintiffs' evidence tended to show that the sender filed this message with the defendant at about nine o'clock on Sunday morning, January 23, 1916, and that it did not reach Lebanon until about four o'clock that afternoon. It is shown that from twenty minutes to one hour is the reasonable and ordinary time required for transmitting such a message between those points.

Other evidence tended to show that the message was not filed at the sending office until eleven o'clock Sunday morning.

The special defense set up in the answer is as follows:

"Defendant further answering avers the facts to be: That the telegram set out in plaintiffs' petition

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had the following notice, words and sentences plainly printed on the face thereof: 'Send the following message subject to the terms on the back hereof, which are hereby agreed to,' and 'Read the notice and agreement on the back.' That on the back thereof the following terms and conditions are plainly set out:

" 'All messages taken by this company are subject to the following terms:

" 'To guard against mistakes and delays, the sender of a message should order it repeated, that is, telegraphed back to the original office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, nor for non-delivery of any repeated message beyond fifty times the sum received for sending the same unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or errors in cipher or obscure messages, and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. ' "

It will be noted there is no averment in this special defense that there was a value placed on this telegram. This observation is made because in reading the cases cited by appellant practically all have this same set of provisions in the messages involved, but with this further provision: "In any event the company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this message is hereby valued," etc.

It is further noteworthy that when we come to consider the bill of exceptions and look at defendant's

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exhibit A, to-wit, the conditions on the back of the telegram in question relating to delay and failure to deliver, said exhibit is not set out in full but is abstracted by counsel, and, like the answer, no mention is made of any value placed on this telegram. The failure of the telegram in our case to have a value placed upon it becomes material when we reach the consideration of the amount that may be recovered in this action.

Now the circuit court struck from the answer the special defense above quoted, and the propriety of that action is before us for decision.

The question is: Where a telegram is properly addressed with no error whatever in the address or body of the message which could not, and did not, cause any delay in the transmission and delivery, and yet the message was delayed beyond a reasonable time in being delivered to the addressees, will the amount of recovery by the addressees be restricted to the amount paid by the sender to the company as the charge for transmission and delivery? That is to say, under the stipulation on the back of the telegram heretofore quoted, is the total amount that plaintiffs can recover the sum of thirty-eight cents?

This very question has been considered and decided by the Kansas City Court of Appeals in an opinion by Judge ELLISON in the case of Jacobs v. Western Union Telegraph Company, 196 S. W. 31, wherein it is held that the plaintiff may recover the value of the telegram and will not be restricted to the cost of transmission and delivery where the delay, which caused the damage, could not under any construction have been laid to some error in the message that might have been corrected had it been repeated.

We have no doubt that the law is—under the cases cited by appellant and cited in the case of Poor v. Western Union Telegraph Company, 196 S. W. 28—that if a mistake occurs in the transmission of an unrepeated message whereby the plaintiff is damaged and the mistake or delay or failure to deliver would have been eliminated to some extent at least by a repetition of

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the message, the plaintiff, under his contract as construed by the federal courts and the state courts following such decisions, would be restricted in his recovery to the amount charged for the service. But in no case, except one, to-wit, Clement v. Western Union Telegraph Company, 137 Mass. 463, do we find that the plaintiff is limited to the charge paid for sending the message where unrepeated when there was no error in the address or body of the telegram when received by the addressee that caused the delay or non-delivery.

We think the logic of the Jacobs opinion, supra, is unanswerable and controlling on the facts of our case, and we will follow it rather than the Clement case.

In the present case, as hereinbefore pointed out, there was no value of fifty dollars or any other sum placed on the telegram; or at least if there was the abstract of the record before us fails to show it. Under this condition, following the Jacobs case, the amount paid for sending the telegram being eliminated as a controlling factor, will leave the amount to be recovered by plaintiffs the reasonable value of the telegram, which the jury under evidence sufficient to support the verdict found to be $300.

The court refused instruction No. 2 asked by the appellant. This was error. There was evidence that the message was not filed at the sending office until eleven o'clock in the morning on Sunday which was after the closing hours at the office in Lebanon and there is no evidence that the sending office knew of the office hours at Lebanon. It became a jury question to determine whether this message was filed at nine o'clock, the time sworn to by the sender, or at eleven o'clock as shown by other evidence in the case; and if it was filed at nine o'clock it would further be a question of fact for the jury to determine whether the message could in an ordinary and reasonable time have been transmitted before the office at Lebanon closed at ten o'clock that morning. It has been held in Missouri and is supported by decisions in other states that the

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receiving agent not knowing of the closing hours of the terminal office and merely contracting to transmit and deliver the message according to the rules of the company would not make the company liable for delay in delivery of the message based on the receiving agent's failure to notify the sender of the closing hours of the terminal office. [Taylor v. Western Union Telegraph Co, 181 Mo. App. 288, 168 S. W. 895, and cases cited.]

The judgment is therefore reversed and the cause remanded. *Sturgis, P. J.*, and *Bradley, J.*, concur.

STATE ex rel. W. W. SCRUGGS, Appellant, v. M. E. PACKARD et al., Respondents.

Kansas City Court of Appeals, January 28, 1918.

1. **BONDS: Notary Public: Negligence in Taking Acknowledgment: Liability: Damages.** A notary's bond is purely one of indemnity, and where suit is brought thereon the relator is limited in the amount of the recovery to the actual loss sustained by the negligent act of the notary, the liability extending only to such damages as were proximately caused by such act.

2. ———: ———: ———: ———: ———. Relator lent his money on a note apparently secured by chattel mortgage on cattle, but which was worthless since there were no such cattle in existence nor did any individual of the mortgagor's name or description exist or own any such cattle. Relator took the note and chattel mortgage without investigation, relying upon the fact that similar notes had been paid. The notary negligently certified to the identity of the mortgagor, but the relator's loss arose from the fact that no cattle were in existence from which security could have been had if the notary's certificate had been true. The act of the notary did not have the effect of substituting another in the place of the one who has obtained the former loans since the evidence shows that the same man made relator's note. Consequently, the notary's certificate did not proximately cause the loss, and, therefore, relator could not recover more than nominal damages, but, because the notary's act was a violation of official duty which relator was entitled to have performed, relator is entitled to nominal damages.

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Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney,* Judge.

AFFIRMED.

McGilvray, Woodbury & Woodbury and *H. H. McCluer* for appellant.

Morrison, Nugent & Wylder and *H. L. Hassler* for respondents.

TRIMBLE, J.—This is a suit on the defendant Packard's official bond as a notary public in and for Jackson county, Missouri. The charge is that through the notary's negligence in taking an acknowledgment to a chattel mortgage, the relator sustained a loss of $6250, which, he seeks to recover and for which he prays judgment. At the close of plaintiff's evidence the court, at defendant's request, instructed the jury to find for plaintiff but for nominal damages only and the jury returned a verdict assessing damages at one cent. Thereupon plaintiff appealed.

For many years before and up to the transaction involved in and forming the basis of this suit, the firm of McCoy & King had a good reputation and conducted at the stockyards in Kansas City an apparently successful business as a livestock commission firm, in the course of which they obtained for their patrons loans from various banks and individuals. These loans were secured by chattel mortgages on cattle located in the trade territory of Kansas City, and were obtained by the firm taking the secured paper payable to themselves and endorsing it over to the bank or individual making the loan. This method of procedure is common to livestock commission firms.

Relator was engaged at said stockyards in the livestock loan business, buying and lending on such notes secured by chattel mortgage on cattle. He had, up to a few months prior to the occurrences forming the basis of this suit, been associated in business with his

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father, but the latter had retired and the son had taken over the business for himself. In April, 1915, he purchased of McCoy & King a note for $6250 purporting to be signed by one, C. J. Gregory, and purporting to be secured by a chattel mortgage on 172 head of cattle in Barber county, Kansas. The chattel mortgage had an acknowledgment attached thereto taken by the defendant Packard, wherein she certified that on April 1, 1915, "before me personally appeared C. J. Gregory known to me to be the person described in, and whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as his free act and deed" etc.

The note not being paid at maturity, investigation was made and it was discovered that there was no such person as C. J. Gregory, nor was there any cattle of the kind or of any similar character on the location described, and no cattle in Barber county, Kansas, owned by anyone named C. J. Gregory.

When this discovery was made, it also came to light that McCoy & King, payees in the note and who had sold it to relator, had been engaged in a series of frauds through the use of spurious cattle paper. They were indicted, and, when called upon to testify in this suit, stood on their constitutional rights. It is not claimed, however, that the notary, Packard, in any way participated in or knew of the fraudulent acts of McCoy & King or that she was in any way guilty of fraud. The petition alleges, and it seems to be conceded on all sides, that a person pretending to be C. J. Gregory appeared before her, the said notary, with the note and chattel mortgage, and executed and acknowledged it and also swore to an affidavit of ownership of, and clear title to, the cattle. The notary was negligent in certifying in the acknowledgment that C. J. Gregory was known to her, and had appeared before her, since it seems that she did not know the man who acknowledged the mortgage, but accepted McCoy's introduction of him as C. J. Gregory.

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The note in question was a renewal of a note given six months before, which was itself the renewal of a note given six months before that; all of them purporting to be secured by chattel mortgage on the same cattle. The first two notes, the original and the first renewal, had been obtained from McCoy & King for the National Bank of Providence, Rhode Island, by and through the loan company of relator's father with whom, as stated, relator was then associated. In this way, relator knew of said two notes and was well acquainted with the representations made by McCoy & King as to C. J. Gregory and with a written statement addressed to McCoy & King, dated February 12, 1913, purporting to be signed by C. J. Gregory and sworn to before said Packard as notary as to Gregory's financial condition, which McCoy & King had presented to and filed with said father's loan agency. When the Providence Bank's renewal note fell due, McCoy & King presented to relator the note and chattel mortgage, bearing the acknowledgment by Miss Packard as above stated, and relator took the loan himself by taking from McCoy & King an endorsement to him of said note and paying the bank the amount due it.

Of course, when McCoy & King's crookedness was discovered, it was also found that they were insolvent.

It appears from relator's own testimony that from the time McCoy & King got the loan on the first note, obtained by the Providence bank through the loan agency aforesaid, on down to the discovery of the fraud in connection with relator's note, no investigation was made by him or any one else to discover whether there were any cattle in existence as described in the chattel mortgages securing the various notes, or whether there was such an individual as C. J. Gregory in Barber county, Kansas. In taking the note and chattel mortgage as security for his loan, relator relied partly upon what McCoy & King told him in reference to Gregory, partly upon the written statement as to Gregory's financial condition which McCoy & King had filed with the loan agency to obtain the first loan, and partly, and,

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as relator says, "quite strongly" upon the fact that other loans to Gregory had been paid. The payment of these other loans, however, is shown to have been made through McCoy & King on checks endorsed by them. So that all these matters upon which relator relied amounted to no more than representations made by McCoy & King which were accepted by relator as being true without any investigation as to Gregory's *title* to the cattle or as to their existence. Both McCoy & King talked to relator about C. J. Gregory; and King, in whom relator had great confidence, told him the Gregory paper was good.

Relator says that he knew the notary did not certify that the cattle were there; also that he knew that, under the laws of Kansas, an acknowledgment was not necessary to the admission of a chattel mortgage into the recorder's office, and that while on file it would have been valid to impart notice without any acknowledgment. And while he says he relied upon the notary's certificate as to the identity of C. J. Gregory, yet he explains this by stating that he compared the signatures on the former note and financial statement with that on the new note (which appeared to correspond), and relied upon the notary's certificate that "this was the same man signing it who had the other," meaning the other notes and papers. But he admits that, for all he knew, *the same man did sign them all,* and there is no evidence whatever to show that they were signed by a different man. On the contrary, they were all signed by the same man, and the notary's act in taking the acknowledgment to the mortgage relator afterwards got did not cause him to take any other or different security from that the other two notes had. They all had the same infirmity, namely, there were no cattle in existence to give them security and no man by the name of Gregory owning any such cattle or cattle of any kind.

Here, then, is a case where although the notary has negligently certified to the identity of the mortgagor yet that negligence is not the *proximate* cause of

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relator's loss. The loss arises from the fact that no cattle were in existence from which security could have been had if the notary's certificate had been true, and because relator failed to make any investigation to ascertain the existence and ownership of such cattle. A bond to secure the faithful performance of a notary's duty "stands good as an idemnity against all the natural and proximate consequences of a breach of that duty." [State ex rel. v. Tittman, 134 Mo. 162, 171; State ex rel. v. Thompson, 81 Mo. App. 549, 556.] The notary's certificate can in no wise be deemed to certify to the ownership of, or title to, the property described in the instrument acknowledged, nor can anyone rely upon the certificate of acknowledgment as evidence of such title. [State ex rel. v. Thompson, supra.] "The bond of a notary is purely one of indemnity and if the relator recovers, the amount of the recovery is limited to the amount of the actual loss sustained by the act of the notary." [State ex rel. v. Hallen, 165 Mo. App. 422, 438.] And the liability extends only to such damages as were *proximately* caused by the negligent act of the notary. [State ex rel. v. Plass, 58 Mo. App. 148; 1 Corpus Juris., 904; State ex rel. v. Boughton, 58 Mo. App. 158; Oakland Bank v. Murfey, 68 Cal. 445.] In Caffin v. Braton, 78 Ark. 162, 167, it was held, in a case based on a negligent certificate of a notary to an assignment of homestead rights falsely purporting to have been executed by one Mayberry, that if the real Mayberry did not in fact have any homestead right to transfer, "a false certificate of acknowledgment that he had executed an assignment of such right to another . . . would not be the proximate cause of injury."

In State ex rel. v. Plass, supra, it was held that the relator in that case had a right to assume that the suppositious characters named in the certificate were real individuals; but that it could not be said that the loss was caused by the notary's act unless it was permissible to presume that "the pretended grantors existed because the notary so certified," and, then on that pre-

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sumption found another presumption that "they owned the land because they existed." So in this case relator no doubt had a right to assume from the statement of the notary's certificate that Gregory existed, but relator had no right to assume that because he existed, the cattle were also in existence and Gregory had title thereto. Relator had no right to make, and *did not make,* these two last assumptions from the notary's certificate, but believed them by reason of his dealings with McCoy & King and the payment of former loans by the supposed Gregory. And the act of the notary did not have the effect of substituting another man in the place of the one who had obtained the former loans since the evidence tends to show that the same man who made the former notes also made relator's note, and there is no evidence tending to show the contrary. Consequently, the notary's certificate cannot be said to have proximately caused the loss even if relator did rely on said certificate to assure him that the signer of the note he got was the same man that had signed the others.

In the following cases cited by appellant, State ex rel. v. Ryland, 163 Mo. 280; State ex rel. v. Grundon, 90 Mo. App. 266; State ex rel. v. Meyer, 2 Mo. App. 413; and State ex rel. v. Balmer, 77 Mo. App. 463, the property was in fact owned by the one whom the notary negligently and untruly certified had acknowledged the instrument. So that, but for the untruthful certificate, there would have been no loss, and, therefore, the notary's act undoubtedly caused, and proximately caused, the loss; and the officer and his surety were held liable. We have been unable to find any case, where this question was under consideration, holding the notary liable for more than nominal damages for a *negligent* performance of duty, where the property was not in fact owned by the one falsely stated in the certificate to have acknowledged the instrument. In the case of State ex rel. v. Hallen, 165 Mo. App. 422, the wife, who, through the notary's negligence, falsely appeared in the certifi-

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cate to have acknowledged the deed, *owned the property*, and it was conceded to be worth the amount of the recovery over and above the genuine incumbrance. The same fact as to the wife's ownership was in the case on the second appeal (196 S. W. 1067), so that, if there are any remarks therein seeming to be contrary to the view herein expressed, they are not to be regarded as within the decision announced. The case of State ex rel. v. Ogden, 187 Mo. App. 39, was one where the notary *fraudulently* certified to a false acknowledgment and by means of such fraudulent certificate obtained the relator's money. It has no application to a case like this.

We are of the opinion that the judgment should be affirmed. It is so ordered. All concur.

BEN F. WARE, Appellant, v. MARTIN FLORY et al., Respondents.

Kansas City Court of Appeals, February 18, 1918.

1. **HUSBAND AND WIFE: Domicile: Right of Husband to Fix: Presumption.** The husband, as the head of the family, has the right to fix the domicile or matrimonial residence without the wife's personal agreement or consent thereto, and the wife is bound to follow her husband when he changes his residence, provided the change is made by him in the *bona fide* exercise of his power. The law presumes that the domicile of the husband is the domicile of the wife and that the residence of the wife follows that of the husband.

2. **ATTACHMENT: Intent to Leave the State.** Since the husband can change his domicile without obtaining the wife's consent, and the wife's residence follows and coincides with that of her husband, his intention to change the domicile determines her intention to change in the absence of any showing that the wife refused to recognize or abide by the husband's intention. Hence, in such case, in order to sustain an attachment on the ground of an intent to leave the State, the attaching creditor need only show the husband's intention in that regard without showing similar intention on the part of the wife.

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3. ———: ———: **Affidavit: Pleading.** The fact that the pleading or statement in the affidavit for attachment, said that defendants, who were husband and wife, were about to remove their property out of the State with intent to change their domicile, did not, in the absence of any showing that the wife refused to recognize or abide by her husband's decision, require proof as to the formation of a personal intention on the wife's part to change. If such was an allegation as to the wife's intention it was merely a pleading thereof according to its legal effect.

Appeal from Livingston Circuit Court.—*Hon. Arch P. Davis,* Judge.

REVERSED AND REMANDED.

Frank Sheetz and *S. L. Sheetz* for appellant.

J. M. Davis & Son for respondents.

TRIMBLE, J.—Appellant sued respondents, who are husband and wife, upon their joint note, and in aid of that action secured a writ of attachment and garnisheed money belonging to the husband in the hands of another. The appeal is from the attachment branch of the case.

One of the grounds alleged in the affidavit for attachment was: "That the defendants are about to remove their property and effects out of the State of Missouri with the intent to change their domicile."

The issue which appellant tried and upon which he submitted his right to an attachment was whether or not the husband, Martin Flory, was about to remove out of the State with the intent to change his domicile at the time of the attachment. All of the evidence showed that the defendants were living together as husband and wife. There was a very strong showing by appellant's evidence in support of the charge relied upon as ground for the attachment. Indeed, it is practically unquestioned that the defendant, Martin Flory, had moved his family from the farm into town and had left them there temporarily while he went to Kansas to secure a home for himself and family. Defendants,

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over the objection of appellant, introduced evidence to the effect that the wife did not want to go to Kansas, and that she had not formed an intent to go. There was no evidence that the wife refused to go nor evidence that the husband, having intended to go, changed his mind because of any disinclination or refusal, on the wife's part, to go. At the outset of the trial and throughout, the appellant took the position that, as defendants were husband and wife, if the husband intended to change his domicile, then his intention was the determining issue and that, under the law, the wife's intention or desire followed and coincided with that of her husband. There was no evidence that defendants had separated or intended to separate, or that the wife refused to go, or that the husband had abandoned his intention because thereof.

In defendants' instruction 1, the jury were told that the burden was upon plaintiff to prove that both defendants intended to leave the State; and the latter part of defendants' instruction No. 4 required proof that both intended to leave the State. This was in conflict with the instructions asked by appellant. The modification of plaintiff's instruction No. 3 by inserting the words "against both defendants" accentuated this conflict and would still further lead the jury to think that the attachment could not be sustained unless it was established that the wife also had formed a personal and individual intention on her part to remove to Kansas.

The husband, as the head of the family, has right to fix the domicile or matrimonial residence without the wife's personal agreement or consent thereto, and the wife is bound to follow her husband when he changes his residence, provided the change is made by him in the *bona fide* exercise of his power. [15 Am. & Eng. Ency. of Law (2 Ed.), 812; 21 Cyc. 1150.] The law presumes that the domicile of the husband is the domicile of the wife and that the residence of the wife follows that of the husband. [State ex rel. v. Wurdeman, 129 Mo. App. 263, 276-7.] Since the husband has the

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right to change his domicile without obtaining his wife's consent, and since the wife's residence follows and coincides with that of the husband, it would seem that his intention to change the domicile determines her intention to change in the absence of any evidence showing that the wife refused to recognize or abide by the husband's intention or decision. There was no such evidence. All that the evidence showed was that she did not want to go and that she herself had not formed an intention to go. But there was no evidence tending to show that she was going to remain in Missouri regardless of her husband's intention or wish, nor was there any evidence that he abandoned said intention because of his wife's feelings on the subject. In other words, under the evidence, the intention of the husband was, in legal effect and contemplation, the intention of the wife. The fact that the pleading, or statement in the affidavit, said that the defendants were about to remove their property out of the State with intent to change their domicile did not, in the above state of the evidence, require proof as to the formation of a personal intention on the wife's part to change. If it was an allegation as to the wife's intention it was merely a pleading thereof according to its legal effect.

Instructions Nos. 1 and 4 for the defendant, therefore, stated an erroneous rule and were in conflict with those asked by plaintiff which were correct as applied to the facts in the case. The latter cannot be regarded as curative of the former. [Ross v. Metropolitan St. Ry. Co., 132 Mo. App. 472, 481.] Certainly plaintiff's instruction No. 3, as modified, could not cure anything. The fact that a part of defendants' instructions may be correct does not cure the error caused by their other instructions that were incorrect. [Standard Oil Co. v. Myer Bros. Drug Co., 74 Mo. App. 446.]

The modification of plaintiff's instruction No. 1 by inserting therein as a definition of the word "domicile" the words "that is, his permanent home" was hardly specific and full enough as applied to the evi-

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dence in this case, since it had a tendency to mislead the jurors who would understand the word "permanent" in its popular and usual meaning and who would not know that a present intention to make Kansas a domicile could exist so as to give cause for an attachment even though after removal such intention be changed the next day. Other complaints of error are made but they need not be noticed.

The judgment is reversed and the cause is remanded. All concur.

EDNA E. KNOX, Respondent, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY and THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, Appellants.

Kansas City Court of Appeals, February 18, 1918.

1. **NEGLIGENCE: Evidence: Joint Defendants: Relative Duties and Obligations.** In an action for damages for personal injuries against joint defendants the latter are not permitted to bring into the case the relative duties and obligations existing between themselves, as such a controversy involves the liability of each to the plaintiff, and not their responsibilities among themselves designed to define their rights in their business relations to each other. The law-making power, and not the defendants, can alone promulgate their obligation and liability to plaintiff.

2. **———: Excessive Verdict: Passion and Prejudice.** Where there is evidence of probative force that the plaintiff suffered a severe injury as the result of a collision, the action of the trial court in reducing the verdict by half does not show that the jury was governed by passion and prejudice.

3. **———: Judgment Against Two Defendants: Reversed as to Both.** Where the appellate court finds that one of two defendants is entitled to a reversal of a judgment obtained against both, the judgment must be reversed as to both, notwithstanding the error causing the reversal was injected into the case by the other defendant and not by the plaintiff.

4. **NEW TRIAL: Newly Discovered Evidence: Discretion of Trial Court.** The granting of a motion for a new trial on the ground

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of newly discovered evidence rests largely in the discretion of the trial court, and many things must be present, such as the element of diligence, the probability of the new evidence producing a different result, and that it is not merely cumulative or simply to impeach the character or credibility of witnesses, before such a motion should be granted.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

REVERSED AND REMANDED.

Hadley, Cooper, Neel & Wright and *J. D. Bowersock* for appellants.

Brewster, Brewster, Kelly & Buchholz for respondent.

BLAND, J.—This is an action for personal injuries. Plaintiff recovered a verdict and judgment against both defendants and they have appealed. As a matter of convenience the defendant, Missouri, Kansas & Texas Railway Company, will hereinafter be referred to as the Railroad Company and the defendant, The Missouri & Kansas Interurban Company, will be referred to as the Interurban Company. The accident happened in the city of Olathe, Kansas, at about 9:55 P. M. on the 4th day of January, 1915, while plaintiff was a passenger upon one of the cars of the Interurban Company. At the point of accident the Frisco Railroad Company maintained four tracks running northwardly and southwardly across a public street in said city. The defendant's, Interurban Company, track ran along said street and crossed said four tracks in an easterly and westerly direction. When the car in which plaintiff was seated (which was a west-bound car) reached a point with its rear trucks on one of the railroad tracks, a caboose and freight train of the defendant Railroad Company, using the tracks of the Frisco Railroad, backed into the Interurban car and injured plaintiff.

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The petition charges general negligence against the Interurban Company and specific negligence against the Railroad Company.

Plaintiff called as her witnesses the motorman and conductor on the Interurban Company's car upon which she was a passenger. The conductor testified that when the Interurban company's car reached a point twenty (20) or thirty (30) feet from the railroad tracks it stopped and he alighted from the car and went on to the tracks and looked in both directions for trains; that a Frisco train was standing to the north and near the crossing and had an engine attached to it; that about 100 or 140 feet south of the Interurban tracks he saw the caboose and rear end of the freight train that later backed into the car; that at that time the freight train was standing still; that he then motioned for the motorman to proceed across the tracks; that it was in the nighttime and there was no one on the rear of the freight train or anything there that one by looking could see and tell when the train moved; that he did not notice that the freight train had moved until its rear end had reached a point forty to fifty feet from the Interurban Company's tracks; that he knew that it moved at that point only by reason of his hearing the jamming of the cars, and that it was then too late to avoid the accident. The motorman testified that the conductor alighted from the car and went to the place described by the conductor and that the conductor gave him a signal to proceed across; that he was unable to see the freight train approaching for the reason that there was a string of cars standing on a track between him and the track upon which the freight train was standing, which obscured his view until he reached a point eight (8) feet from the track upon which was the freight train; that at that time he first saw the train and immediately attempted to stop his car but was unable to do so but thought that he might beat the train across, so he speeded up but was unable to get across before the collision. He further testified that when he reached

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a point where he could see the train he was going at a rate of speed that would require a distance of twenty (20) feet in which to stop the car. There was evidence on the part of the Railroad Company that the Interurban car was late; that it made no stop; that no one alighted from it before it proceeded across the railroad tracks, and that when the Railroad Company started its train, the latter gave three whistles.

At the trial the defendant, Interurban Company, sought to prove and argue to the jury that when its conductor went on to the tracks and saw the stationary train he was justified in assuming that the train would not back across the street and the Interurban's tracks without giving some warning; that the train started up and ran into the Interurban car without giving any warning or signal whatever to show that it was going to cross the street. The court refused this evidence and refused to permit counsel for the Interurban Company to argue the matter before the jury and reprimanded him for referring to it. This evidence, and the effort to argue the same to the jury, was refused by the court on account of objections made by the defendant, Railroad Company. The basis of these objections was that there was nothing in plaintiff's petition in reference to any failure of the Railroad Company to give any warning or signal before backing its train across the street in question. On the rulings of the court in reference to this matter the Interurban Company bases a claim of error, and in support thereof it urges that it had a right to introduce testimony tending to show and to argue to the jury any fact that would exculpate itself from negligence. There was evidence tending to prove that the cars were "kicked" or "shunted" across into the Interurban car. And in this connection this defendant suggests that there is a rule of law that a railroad company may not start up and back its trains or "kick" them across a public street without giving some warning. This is undoubtedly the rule. [Wilkins v. St. Louis, I. M. & S. R. R. Co., 101 Mo. 92; Fusili v.

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Mo. Pac. Ry. Co., 45 Mo. App. 535; O'Connor v. Mo. Pac. Ry. Co., 94 Mo. 150; Tabor v. Missouri Valley Ry. Co., 46 Mo. 353; 2 Shearman and Redfield on Negligence (6 Ed.), sec. 471.]

There was no mention in the pleadings of a failure on the part of the railroad company to give a signal or warning, and for this reason plaintiff, if objection had been made, could not have introduced evidence tending to show such failure. However, the offer made on the part of the Interurban Company had nothing to do with plaintiff's right to recover against the railroad company. The offer was made for the purpose of showing that the Interurban Company had used a high degree of care in the operation of its car as it was required to do. We think that the court erred in refusing to allow the Interurban Company to introduce this evidence and to argue the matter to the jury. Had such evidence been admitted, as it should have been, the defendant, Railroad Company, could have been protected by asking an instruction from the court to the effect that the jury was not to consider the evidence in connection with the railroad company's liability to plaintiff. [State v. Phillips, 24 Mo. 475; The Union Savings Association v. Edwards, 47 Mo. 445; Stotebier v. St. Louis Transit Co., 203 Mo. l. c. 721; Carle v. DeSoto, 63 Mo. App. 161; Phillip v. Hamilton Brown Shoe Co., 178 Mo. App. 196.]

The rule as to the admissibility of evidence under circumstances as present in this case is stated by Wigmore as follows:

"It constantly happens that a fact which is inadmissible for one purpose is admissible for other purposes; while, on the other hand, a fact which is entirely admissible, so far as some rules are concerned, is excluded because it fails to satisfy some other rule. . .

In other words, when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules appli-

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cable to it in some other capacity and because the jury might improperly consider it in the latter capacity. . .

Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the court suffices for that purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection." [Wigmore on Evidence, sec. 13.]

There is a rule that two joint defendants are not permitted to bring into the case the relative duties and obligations existing between themselves, as the controversy involves the liability of each to plaintiff and not their responsibilities among themselves. Defendants are not authorized to invoke agreements, rules or customs made among themselves, designed to define their rights in their business relations to each other under ordinary circumstances, and about which the plaintiff has no concern, nor can one of such defendants shift the entire responsibility, so far as may affect plaintiff, upon the offender against the agreement, rule or custom among themselves, when the non-offender could have avoided the accident by the use of ordinary or the highest degree of care. The law-making power and not the defendants can alone promulgate the obligation and liability of defendants to their passengers. [Taylor v. Grand Avenue Co., 137 Mo. 363; O'Rourke v. Lindell Rd. Co., 142 Mo. 342.]

Plaintiff attempts to invoke this rule as against the right of the Interurban Company to show that it was not guilty of negligence on account of the Railroad Company not giving the warning. The duty of the railroad company to give the warning was not based upon any rules or customs existing between these defendants, and the evidence was not introduced for the purpose of bearing on any duties, rights or liabilities of the defendants between themselves. The rule was one made by the law over which neither one of the defendants

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had any control, and it was a rule that the jury might have found the conductor of the Interurban Company had a right to assume would be observed by the Railroad Company.

It will not do to say that even if the Interurban Company was not advised of the movement of the train by the required warning that, nevertheless, it was negligent in another respect, that is, that the jury might have found that the motorman in discharging the burden of using the highest degree of care was guilty of negligence in running his car to within eight feet of the railroad track when he was unable to see the approach of trains from the south on such track, and not having his car sufficiently under control so that when he reached a point where he could see he could have stopped the car before it reached the track. As already stated, the evidence shows that when the motorman reached the place where he could see he was eight feet from the track and that the car was going at such a rate of speed that he could not stop it in less than twenty feet. Unless we could say as a matter of law that this was negligence on the part of the motorman, and that upon a showing to this effect plaintiff was entitled to an instruction that the jury should find for the plaintiff, we do not think that it would make any difference in the matter under discussion. All of the circumstances should have been submitted to the jury as it was their peculiar province to pass upon them. The motorman had received the signal from the conductor to proceed across the track and the freight train was not the only train present to indicate danger and that required the attention of the servants of the Interurban Company. The jury might very well have found that under such circumstances it was the duty of the motorman to hurry across the track as quickly as possible to avoid new dangers that might be ushered in at any moment. On the other hand, it might have found that the motorman was under some obligation to watch the Frisco train. While the jury might have

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actually found that the motorman of the Interurban Company was not negligent in proceeding across the track as he did, yet they were not allowed to consider whether the conductor had discharged his full duty by relying upon the signal that should have been given by the Railroad Company. A showing by the Interurban Company that it relied upon the Railroad Company to discharge a duty imposed upon the latter by law to give some signal or warning before crossing the street, tended to exculpate the Interurban Company from fault, and this company had a right to have the jury consider this with all other competent matters that tended to show that it had discharged its full duty. It is true that there was evidence, introduced by plaintiff without objection, that the conductor of the Interurban car relied upon the railroad company to give some such warning. Plaintiff urges that in view of this fact the court did not err in refusing the Interurban's evidence to the same effect. However this may be, the court erred in refusing to permit the Interurban Company the privilege of arguing the matter to the jury and in reprimanding counsel for so doing.

A point is made that the court erred in submitting the case to the jury on the theory that the burden was upon the Interurban Company to show that it was not negligent. In this connection it is said that as against the Interurban Company the petition charges general negligence but that plaintiff, having introduced the evidence of the conductor and motorman to explain how the accident occurred, by her evidence showed that she was in possession of all the facts in relation to the cause of the accident. This evidence of plaintiff did not show that she knew the whole cause of the accident. There was evidence in the case, not introduced by plaintiff, that the conductor did not get off of the car to watch for the approach of the train and to signal the Interurban car to cross the tracks, but that the car was late and was seen to cross the tracks without any care on the part of anyone in control of it, and that the

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train signaled before moving. The introduction of the evidence of the conductor and motorman was merely an attempt on the part of plaintiff to prove negligence under the facts, and did not show that she knew all about the accident. A mere attempt to prove negligence can hardly justify the assumption that plaintiff knew the cause of the accident. [Kilroy v. K. C. and K. V. Ry. Co., 195 S. W. 522; Price v. Railway, 220 Mo. 435; Loftus v. Railroad Co., 220 Mo. 470; Dollie C. Mining Co. v. Railroad, 194 Mo. App. l. c. 41.]

A point is made that the court erred in not awarding defendants a new trial upon the ground of newly discovered evidence. In support of their motions for new trial defendants introduced an affidavit which stated that plaintiff had been riding on a motor cycle and had been thrown therefrom prior to the collision in question. (Plaintiff claimed that the accident sued for had resulted in womb trouble.) Evidence brought out at the trial tended to show that defendants at that time knew of the motor cycle incident. Other affidavits stated that plaintiff, before the collision, frequently had improper relations with men, was very nervous and had ovarian trouble. The affidavits show that defendants' first obtained a clue to this information after the verdict and from some of the employees of the Interurban Company.

Motions for a new trial on the ground of newly discovered evidence are not encouraged. [Grocery Co. v. Hotel Co., 183 Mo. App. 429 and cases cited therein.] The matter of refusing or granting such motions is largely in the discretion of the trial court. [McPherson v. Harvey, 183 S. W. 653 and cases therein cited.] In order that such a motion may be granted a number of things must be present including the element of diligence, the probability of the new evidence producing a different result, the new evidence must be not merely cumulative and not simply to impeach the character or credit of the witness. [State v. Speritus, 191 Mo. 24.]

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We think that the evidence claimed by defendants to have been newly discovered might well have been found by the trial court to have failed to meet the requirements of diligence and that it be not cumulative. As to the motor cycle incident, there is evidence that defendants knew the facts at the trial. As to the other matters defendants' affidavits show that they were known to their employees. The trial court, no doubt, found that had the defendants exercised diligence the matters could have been discovered before or during the trial and that the evidence was merely cumulative. Defendants put on the stand many doctors who had examined plaintiff and who testified as to the causes of her ailments. We do not think the trial court abused the discretion vested in him in his ruling on these matters.

A point is made that the verdict was excessive. The verdict was for five thousand ($5000) dollars but the court required plaintiff to make an involuntary remittitur of twenty-five hundred ($2500) dollars, which was complied with. There was evidence tending to show that plaintiff was a young woman of good health and was engaged as a piano player at the time of her injury. That the collision was one of great force, throwing plaintiff into the aisle of the car; that she lost consciousness and came to in a little while and again fainted; that she was taken to her home in Olathe in an automobile; that she was unable to walk; that a doctor was sent for and two doctors came to see her the night of the accident; that one of the doctors came to see her three times and after that the other doctor treated her; that she came to Kansas City about six weeks after the accident and the next day she saw another doctor and that this doctor had treated her three times a week until the trial; that she could not be moved until the next day after the accident and then was moved on a stretcher; that she suffered intense pain in her back and for a long time "could not raise off her back;" that she had a place as large as a saucer

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on her right side and a bruise on her right leg; that the accident caused her to have a severe case of womb trouble and irregular and painful menstrual periods from which she suffered at the time of the trial; that she had none of these troubles before the accident; that she was never nervous before the accident but since had been very nervous, especially at night; that she could not sleep and would wake up and jerk and scream; that she was married about five months after the accident and has been able to do light work in the office of a laundry since; that since the accident she had been going to dances occasionally; that she went more to hear the music than anything else as she could not play since she was hurt; there was medical testimony that plaintiff was suffering from a very severe case of womb trouble and irregular and painful menstrual periods, and that these ailments could have been caused by the accident.

There was evidence of probative force that plaintiff suffered a severe injury as a result of the collision. We do not think that the fact that the lower court reduced the verdict by half shows that the jury was governed by passion and prejudice in its rendition under the circumstances. Nor do we think a recovery of twenty-five hundred ($2500) dollars under the circumstances was excessive.

There was no error in the instructions. But from what we have said the case must be remanded as to the Interurban Company. The Railroad Company contends that if the case is remanded as to one defendant it must be remanded as to both, citing Miller v. Transit Co., 155 Mo. App. l. c. 546-7-8. In that case it was held that the defendants could enforce contributions between themselves in a separate action brought under section 5431, Revised Statutes 1909, for that purpose, if the circumstances allowed. And this being a fact, each one was interested in the amount of plaintiff's recovery and each, under the circumstances of that case, ought to have the privilege of defending plaintiff's

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suit throughout. In that case error was found to have been committed against only one of the tortfeasors, but the case was remanded as to both. However, in the Miller case the error was injected into the case by plaintiff. In the case at bar the error was made at the invitation and request of the Railroad Company and as plaintiff was willing that the evidence be introduced and that the argument be made to the jury, she was in no wise accountable for the error. The defendant, Railroad Company, was solely responsible for the error committed and it cannot now take advantage of its own wrong. Having brought the error into the case, it cannot now ask that the judgment be reversed and remanded for an error of its own commission. [Hogan v. Hinchey, 195 Mo. 527; Western Tie and Timber Co. v. Naylor Drainage District Company, 226 Mo. 420; Hiler v. Cox, 210 Mo. 696; Price v. Breckenridge, 92 Mo. 378; Mitchell v. Wabash Ry. Co., 97 Mo. App. 411; Lee v. Hassett, 39 Mo. App. 67; White v. The Nelson Mfg. Co., 53 Mo. App. 337.]

However, in view of our statute, section 2090, Revised Statutes 1909, there can be but one final judgment in the case, and it has been held in a case involving the same dilemma that where it is necessary to reverse and remand a case as to one defendant it must be remanded as to both. Plaintiff being unwilling to dismiss the case as to defendant, The Missouri and Kansas Interurban Railway Company, and thus obviate any necessity of reversing the case, the judgment must be reversed and remanded as to both defendants, and it is so ordered. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1918.

STATE ex rel. McCLURE et al., Relators, v. DANIEL E. BIRD, Respondent.

Kansas City Court of Appeals, March 18, 1918.

PROHIBITION: Picture: Rules Circuit Court: Contempt. The circuit court of Jackson County, Missouri, is composed of several divisions, presided over by separate judges, one of which is the assignment division. A judge of a division issued a temporary restraining order against the Chief of Police restraining him from arresting an exhibitor of a picture known as "I, Mary McLane—Men Who Have Made Love to Me." The writ was made returnable to the assignment division, where it was dissolved before return day. The police then arrested the exhibitor and the division judge issued an order against them in contempt, and the Chief of Police obtained a temporary writ of prohibition from the Court of Appeals. It was *held* that the division judge was without further jurisdiction after returning the first writ to the assignment division, and that he should be prohibited from pursuing the proceeding in contempt.

Special rules of the Circuit Court of Jackson County discussed.

ORIGINAL PROCEEDING. PROHIBITION MADE PERMANENT.

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J. A. Harzfeld and *Chas. M. Blackmar* for relators.

C. C. Madison for respondent.

ELLISON, P. J.—Relator McClure is an officer of Kansas City, Missouri, known as the censor of films and pictures. Relator Flahive is the Chief of Police for said city and the other relators are police officers. Respondent is Judge of division 8, of the circuit court of Jackson county, and as Judge of such court issued a temporary injunction or restraining order against relators, restraining them from interfering with William H. Quigley in his exhibition to the general public who desired or were induced, to view a certain picture advertised and called: "I, Mary McLane—Men Who Have Made Love To Me."

The circuit court of Jackson county is composed of several divisions each presided over by its own Judge, each Judge, except as restrained by certain rules, acting as a circuit court and exercising full power and authority of a circuit court presided over by a sole circuit Judge. That court business may be expedited and orderly administration had, the statute (secs. 3968-3976, R. S. 1909) authorizes such Judges, acting in a *banc,* to pass certain rules and regulations in addition to the rules and regulations which may be adopted by circuit court generally. In pursuance of this power the court, in *banc,* provided that at stated periods one of the divisions should be designated as the assignment division to be presided over by the Judge of that division. Under these rules, statutes and regulations, the judge of the assignment division issues all temporary and alternative orders in applications for extraordinary writs, except in urgent instances when he may not be found in the court house, application may be made to one of the other divisions, or the Judge thereof.

At the time respondent herein issued the temporary restraining order above mentioned the division presided over by Judge LUCAS, one of the Judges of said court, was duly designated assignment division. But on the statement of Quigley, that he could not be found, the

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respondent, acting under said rules and regulations, issued the temporary restraining order on the 2nd of February, 1918, returnable to the assignment division presided over by Judge LUCAS, on the 11th day of February, 1918. Afterwards, on February 4, 1918, relators filed their motion in such assignment division to which the restraining order issued by respondent was returned, to dissolve such order. This motion was continued until the next day, when, all parties appearing, the assignment division presided over by Judge LUCAS sustained said motion and dissolved said order.

After dissolution of such restraining order relators caused the arrest of the exhibitors of such picture for continuing to exhibit it in violation of an ordinance of Kansas City. Thereupon the respondent issued a citation against relators to show cause why they should not be attached for contempt in violating respondents temporary restraining order. Whereupon relators applied to this court for a writ of prohibition and a temporary order was issued. Respondent has made return and relators have filed a motion for judgment thereon.

The foregoing is a sufficient statement of the facts for our decision. It will be observed that the assignment division of the Jackson County Circuit Court is the division which ordinarily issues, hears and determines extraordinary writs. That in instances of emergency when the assignment division is not in session and the judge thereof cannot be conveniently found another division, or the judge thereof, may issue the writ. In this instance, as we have said, respondent issued the writ making it returnable to the assignment division, and thereafter such assignment division on proper motion, and appearance of parties, dissolved such order. It will be observed that it was after the dissolution of the temporary writ, thus made, that the relators committed the act (arrested the exhibitor of the picture) which moved the respondent to issue the citation in contempt against them.

It is our opinion that the true meaning of the rules of the court in *banc* concerning the issuance and hearing

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of extraordinary writs, is that any divisional Judge or court other than the assignment Judge or court, is a mere substitute for the time being for such assignment Judge, or court, when some apparent necessity demands action in the issuance of such writs, which apparently cannot be had from the assignment Judge. That when a temporary writ is issued by a divisional Judge and is made returnable to the assignment division of the court as in this case, the latter division becomes possessed of the cause as in other cases and proceeds with it, in due course, as in like cases originally instituted in such division, and that the divisional court has no further control or jurisdiction over the cause or proceeding. Jurisdiction is transferred to the assignment division as fully as it is to an appellate court after an appeal has been granted to such court. [In re Grading Bledsoe Hill, 222 Mo. 604, 609.]

It may be remarked that as the authority of a divisional judge, or court, to issue extraordinary writs is special and such Judge's action is in its nature substitutionary, the application for a writ of such character, or the writ itself should, regularly, disclose the fact or reason of giving such divisional judge, or court authority under the rules and regulations aforesaid, to issue such writ, to the end that it may appear why the divisional judge, or court, may rightfully assume authority and jurisdiction ordinarily lodged elsewhere. No such showing is made in these proceedings. But having already disposed of the question before us on the ground above set forth, we need not say what effect the absence of such showing should have.

The rules of the court in *banc* require notice of motions of the character filed in the assignment division by relators to dissolve the temporary restraining order, and it is stated in respondent's return that he "denies that any proper notice was given of a hearing upon said motion and respondent further says that the purported action of Judge LUCAS, as set forth in the petition was without authority and with no effect." It will be noticed

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that this denial is not that there was no notice, the denial is that there was no *proper* notice. But passing that by; it is alleged and is not denied, that there was an appearance generally and argument had before Judge LUCAS in the assignment division resulting in the dissolution of the restraining order. Thus the object of a notice was accomplished, if none was not in fact given.

An interesting brief has been filed by relators relating to the authority of the city to ordain ordinances providing for a board to censor pictures proposed to be exhibited to the general public as well as the necessity for protecting the morals of the community, including young girls and boys, from the influence of coarse, suggestive and otherwise improper exhibitions. But as the foregoing considerations dispose of the case it is not necessary to discuss them.

Judgment on the pleading will be for the relators, and our writ made permanent. All concur.

EUNICE E. FRAZIER, Appellant, v. THE CITY OF ROCKPORT, THE MAYOR, THE BOARD OF ALDERMEN thereof, and the WESTERN STATES CONSTRUCTION COMPANY, a Corporation, Respondents.

Kansas City Court of Appeals, April 1, 1918.

1. **TAXBILLS: Equity: Injunction.** In the absence of statutory provision requiring each street in a city to be treated as a single separate improvement, many streets and parts of streets may be embraced in one plan or scheme of public improvement, if in fact they can all be regarded as parts of the same improvement. The extent of such improvement and what shall be included in it, and its nature and character, are within the legislative discretion of the City Council, and a court of equity will only interfere to correct a clear abuse of the discretion.

2. ———: **Municipal Corporations: Public Improvement of Streets: Connecting Streets.** To require each street of a city to be treated

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as one improvement and the property fronting on that street to participate only in the cost of improving it would lead to great difficulties, often forbidding an improvement entirely, or rendering it inadvisable unless adjacent streets were similarly improved and the whole done as one improvement.

3. ———: **Front Foot Rule.** Under the "front foot" rule each lot abutting on public streets in a city must bear its proportionate share of the entire cost necessary to improve all the streets embraced within the plan or scheme of improvement and not the mere cost of the portion in front of it.

4. ———: **Engineer's Estimate: Lump Sum.** Where the engineer's estimate of the cost of public improvement of streets is in a lump sum and not itemized as by unit measure, but expressly refers to the plans and specifications and states that the estimate is according to them, so that taking the ordinance, the plans and specifications and the estimate together, there would be shown all the information that a detailed and itemized estimate would reveal, such estimate is sufficient.

5. ———: **Ordinances: Advertising of Bids: Clerical Error.** An ordinance, directing a city engineer to advertise for bids for public work and providing that the "highest" bid be accepted is not vitally defective where there is no showing that the use of the word "highest" instead of "lowest" had any effect upon the number of bidders or upon the bids made, the entire bidding being advertised and carried out on the theory that the lowest competitive bid was sought and the contract eventually let to the lowest bidder.

6. **FOREIGN CORPORATIONS: License to do Business: Contracts.** A contract entered into in this State by a foreign corporation not authorized to transact business in this State is not void where the company complies with the statutes of this State before any attempt is made to perform said contract (following Wulfing v. Armstrong Cork Co., 250 Mo. 723).

Appeal from Atchison Circuit Court.—*Hon. John M. Dawson,* Judge.

AFFIRMED.

Edward G. Frazier for appellant.

William C. Ellison for respondent.

TRIMBLE, J.—Plaintiff brought a bill in equity to enjoin the execution of a contract made by the city

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authorities of Rockport, a city of the fourth class, with the Western States Construction Company for the making of a certain public street improvement, theretofore authorized, payment for which was to be made by special assessments levied upon the tracts of real estate abutting upon and benefited by the said improvement. Plaintiff, as the owner of one of these tracts, is directly interested in and affected by said contract and is, therefore, entitled to ask a court of equity to pass upon the validity thereof.

A demurrer to the bill was interposed and sustained, whereupon plaintiff stood upon her bill and appealed.

As the demurrer admits all the facts alleged and properly pleaded in the bill, we must look to it for the facts upon which the case rests. From the statements therein contained it appears that the legislative authorities of said city deemed it necessary that a number of streets and portions of streets, all carefully and explicitly designated, and connected together so as to form one continuous improvement of the same character throughout, should be brought to the established grade and then curbed and guttered so as to make the improved part of the said streets of certain specified widths and of a smooth and even finished surface and such as would permit the drainage of water on the improved portion of said streets into said gutters. In accordance therewith, said legislative authorities enacted the necessary ordinances and resolutions, expressing such necessity and providing for the proposed improvement. The various steps required by law to effectuate this purpose were taken and the proceedings culminated in the advertising for bids for the work, and the acceptance of the bid of the Western States Construction Company as the lowest and best bid. The city executed a contract pursuant to said bid, and the same was about to be put into effect when further proceedings were suspended by the institution of this suit.

It is unnecessary to set forth in detail the necessary ordinances, resolutions, adoption of plans and specifications, the filing of the engineer's profiles, esti-

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mates, etc., and the other procedure required to authorize a municipal street improvement, since, in the absence of a particular challenge thereof by the allegations of the bill, it will be presumed that the municipal authorities complied with the statutory requirements. And, indeed, the bill herein seems to concede, impliedly if not expressly, that all the various steps were taken and are in proper form and valid except in respect to the specified particulars hereinafter mentioned. Aside, then, from the particular complaints and objections leveled by the bill against the legality of the contract and proposed improvement, we assume that the city authorities have the power to provide for the construction of the public improvement aforesaid and for the payment by special assessments on their property abutting upon the proposed improvement and benefited thereby. [Barber Asphalt Paving Co. v. Ullman, 137 Mo. 543, 568; City of Excelsior Springs v. Ettenson, 120 Mo. App. 215.]

The first objection in plaintiff's brief against the validity of the contract and in support of her bill to enjoin its execution, appears to have two branches: First, that since the proposed improvement covers a number of streets and parts of streets, it cannot be regarded as one improvement, no matter what the circumstances are and notwithstanding the recitals in the ordinances and resolutions that it is one improvement and that it is necessary to be dealt with as one improvement; second, that as the streets are to be improved to different widths and, in being brought to grade, will have to be excavated to varying depths at different places, and since the estimate of the cost of the entire improvement filed by the city engineer is in a lump sum and not according to the unit measure—i. e., by the cubic yard or lineal foot, there is no way by which the cost of that part of the improvement to which plaintiff's property really belongs, and only for which it should be assessed with its *pro rata* share, can be ascertained.

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With reference to the first branch of this objection, it should be observed that there are no allegations of fact in the bill which show that, notwithstanding the declarations in the ordinances to the contrary, the improvement proposed is in reality more than one improvement, or that it would be inequitable, unjust, or a fraud upon plaintiff to require plaintiff's property to contribute its *pro rata* share of the cost of improving the specified streets as one single and entire improvement. The bill alleges that Rockport, the county seat of Atchison county, has a population of 1200, that none of its streets are paved, macadamized, curbed, or guttered. And while it alleges that the station of its one railroad is about three-fourths of a mile from the principal business portion of the town and that they are connected by one continuous street, called Main street, which runs north and south through the entire corporate limits of the city, and that the court-house, the high school, the station, and the several churches are separated from one another by distances varying from two to sixteen city blocks, and further alleges certain other statements as to the topography of the city, yet the petition admits that all of the above named public places of the city. "are connected by public streets of said city within the limits of the proposed improvement." The petition elsewhere again concedes that all parts of said proposed street improvement are connected together so as to form a continuous line of improvement of the same material and character throughout and that each piece of property within the district to be improved is connected thereby with every other piece and with the high school, churches, business section and railroad station, and the streets proposed to be improved parallel and cross each other in such manner as to form blocks and squares. And the objection seems to rest upon the bare fact that the streets constitute such a large portion of the town, and upon the further fact that the filling and excavating to be done according to the plans and specifications vary materially in quantity

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throughout the line of the proposed improvement, being more on some streets and less on others.

There are, therefore, no *facts* alleged in the petition which show, or which will enable the court to say, that the city authorities have declared that to be one improvement which is in fact more than one; while, on the contrary, the facts that are stated seem to indicate that the improvement is in fact one improvement and necessary to be treated as such as declared by the authorities in their various enactments. In Church v. People, 53 N. E. 554, 555, it is said:

"The extent of an improvement, and what shall be included within it, rests in the legislative discretion of the city council, and the courts will interfere only to correct a clear abuse of the discretion. [Davis v. City of Litchfield, 145 Ill. 313, 33 N. E. 888.] If it appears an ordinance provides for two separate and distinct improvements, the making of one of which could not reasonably be said to benefit property situated upon the other, the combination of the improvements would be regarded as a clear abuse of such discretion."

In City of Springfield v. Green, 120 Ill. 269, 273, the court in meeting a charge that the city authorities had embraced in one enterprise more than one improvement, said:

"While many streets and parts of streets are embraced in the scheme of improvement adopted by the city, yet we regard them all as but parts of the same improvement. The city authorities, in adopting the ordinance, must have found, as a matter of fact, that these streets and parts of streets were so similarly situated, with respect to the improvement proposed to be made, as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so. They were all to be paved with the same material and in the same way, and the fact that there was a difference of a few feet in the width of some of them, and that the cost of paving the railway tracks in others was to be excluded from the estimate, should,

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in our opinion, make no difference in this respect. The similarity of the improvement proposed to be made, and the situation of the property to be assessed, with respect to it, afford a more satisfactory test as to whether they might all be embraced in a common scheme as one improvement, than their actual connection or physical contact with one another."

In 2 Elliott on Roads and Streets (3 Ed.), sec. 694, it is said:

"Improvements are not, however, necessarily distinct and different because different roads or different streets are included, for it may well be that the system is a single and uniform one, although it embraces more than one street. If, in fact, the improvement is a unity, an assessment may be valid, although it embraces in its line more than one street or road. It may often happen that in order to secure a complete and effective system it is necessary to construct a main line with branches, or to improve two or more streets at once so as to secure a uniformity of grade, and in these, or similar instances, there is no reason why the system may not be considered as a single improvement, except, of course, where the statute supplies a reason for a different rule." [See, also, Lewis v. Albertson, 53 N. E. 1071, 1074; Davis v. Litchfield, 33 N. E. 888, 891; 28 Cyc. 972.]

There is no provision in the statute requiring each street to be treated as a single and separate improvement. Many streets and parts of streets may be embraced in one plan or scheme of improvement if in fact they can all be regarded as parts of the same improvement. The extent thereof and what shall be included in it, and its nature and character, are within the legislative discretion of the city council, and the courts will interfere only to correct a clear abuse of the discretion. [People v. Latham, 67 N. E. 403, 406.] The mere fact that more than one street was included in one proceeding was not regarded as fatal in the following Missouri cases, to-wit: Seibert v. Cavender, 3 Mo. App. 421, involving the curbing, grading, guttering and macadam-

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izing of about twenty streets, and Wills v. Burbank, 182 Mo. App. 68, where three streets were included in one improvement. As a practical matter, to require each street to be treated as one improvement and the property fronting on that street to participate only in the cost of improving it would lead to great difficulties, often forbidding an improvement entirely or rendering it inadvisable unless adjacent streets were similarly improved and the whole done as one improvement. Especially is this true in country towns in circumstances where the embracing of several streets in one scheme of improvement benefits every piece of property abutting upon any of the streets so improved, and it is only in this way that the improvement can be had. We are of the opinion that in the absence of any facts showing that the proposed scheme should not be regarded as one improvement or that the council has abused its discretion in the matter, the courts should not interfere, in the absence of a statute forbidding the inclusion of several streets in one proceeding.

If the proposed scheme can properly be regarded as one improvement, then, in theory at least, there is a special benefit accruing to all the property abutting upon the improved streets and flowing from the improvement as a whole. [People v. Latham, supra.] And under the "front foot" rule in this State each lot should bear its proportionate share of the entire cost and not of the mere cost of the portion in front of it. [Municipal Securities Co. v. Metropolitan St. Ry. Co., 196 S. W. 400 402; McQueen v. Van Deusen 189 Mo. App. 492, 499.] This, it would seem, also meets the objection that the engineer's estimate of the cost should have been by the unit measure instead of in a lump sum, since there is no reason for ascertaining the cost of each street or of keeping that separate from the entire cost. The petition sets forth the engineer's estimate and it shows that it was made after the plans and specifications were filed and after they had been approved and adopted by the city. Section 9410, Revised Statutes 1909, provides that when the improvement in-

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cludes the bringing of the street to grade, the whole work shall be let under one contract. Section 9407 provides that an estimate of the cost of the whole work shall be made before any contract shall be let "and no contract shall be entered into for any such work or improvement for a price exceeding such estimate." There is nothing requiring an itemized or detailed estimate, the only requirement being that the Board of Aldermen shall know in advance what the whole cost is and shall not make a contract in excess of the estimate. If the estimate had been by the unit measure, then even though a total cost were mentioned, reference would have to be made to the plans and specifications to ascertain and verify the true total cost. The only purpose of the statute being to restrict the contract price to the estimated cost, we see no use in requiring an itemized estimate, at least none so vitally necessary as to render void an estimate which did not give the cost in items. The engineer's estimate expressly refers to the plans and specifications and says the estimate is according to them. So that taking the ordinances, the plans and specifications and the estimate together would furnish all the information that a detailed and itemized estimate would reveal. The estimate was sufficient. [City of Independence v. Briggs, 58 Mo. App. 241; McChesney v. Chicago, 152 Ill. 543.] "In the absence of a statute requiring a detailed estimate, a gross estimate is generally held to be sufficient." [1 Elliott on Roads and Streets (3 Ed.), sec. 613.]

It seems that the ordinance, which directed the city engineer to advertise for bids, provided in section 4 thereof that the "Mayor and Board of Aldermen may by ordinance accept the highest bid, if made in conformity with this ordinance and said plans and specifications." It will be observed that the word "highest" was used instead of the word "lowest." The petition discloses, however, that the defendant, the Western States Construction Company, *and others* submitted bids, that the bid of the above-named defendant was the *lowest* did and was found by the Board to be the

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lowest and best bid and was so declared to be by ordinance. The use of the word "highest" was, under these circumstances, a mere clerical error. No facts are alleged to show that it had any effect upon the number of bidders or upon the bids made, and the entire bidding was advertised and carried out on the theory that the lowest competitive bid was sought, and the bidding was made and the contract awarded in accordance with the law, that is, to the lowest and not to the highest bidder. Under these circumstances we do not see wherein the above-named obvious clerical defect in the ordinance creates any vital defect. [Maret v. Hough, 185 S. W. 544.]

The defendant, Western States Construction Company, is a Nebraska corporation, and up to the time of entering into the contract with the city and filing its bond for the proper performance of the work, it had not complied with the provisions of our statutes authorizing it to "do business" within this State. However, as soon as these things were done, and before undertaking to perform any part of the work under the contract and before the suit was brought, the said defendant complied with said statutes. The question is whether the mere execution of the contract and bond before complying with our statutes renders the contract void, notwithstanding the fact that as soon as the contract was executed and before any attempt was made to perform anything thereunder, the company duly complied with our statutes? The case of Hogan v. City of St. Louis, 176 Mo. 149, clearly holds that our statutes do not mean that the company must obtain a license to do business here before it can lawfully enter into a contract in this State to do any business herein; that "the obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the State; it is not bound to establish itself here before it can obtain such a contract." Plaintiff contends that this decision is in effect, though not in terms, overruled by the case of Tri-state Amusement Company v. Forest Park, etc., Co., 192 Mo. 404. It may be conceded

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that the general language used by Judge MARSHALL in several places in that opinion is susceptible of this interpretation. And we might so hold were it not for the decision in Wulfing v. Armstrong Cork Co., 250 Mo. 723. That case quotes the Hogan case upon the precise point involved herein and follows the principle therein enunciated. It being a later and the last expression of the Supreme Court on the subject, we follow it.

Believing that the allegations of the bill do not present a situation wherein the court is justified in interfering with the discretion of the city authorities, and that none of the other objections against the validity of the contract are sufficient to destroy it, we are of the opinion that the demurrer was properly sustained. Wherefore, the judgment is affirmed. All concur.

THE CITIZENS STATE BANK OF TRENTON, MISSOURI, Appellant, v. ROSS KNOTT and ALLEN KNOTT, Respondents.

Kansas City Court of Appeals, April 1, 1918.

1. **REPLEVIN: Mortgages and Deeds of Trust: Growing Crops.** A lessee of the mortgagor of land, under a lease made subsequent to the mortgage, with notice of the terms thereof, without the concurrence of the mortgagee, has no greater right to crops, growing on said land and unsevered, than the mortgagor himself would have after condition broken.

2. ———: ———: ———. The object of the proviso in section 2841, R. S. 1909, regarding growing and unharvested crops on lands foreclosed was to protect the tenant who had the growing crop at the time of the sale of the land, whether he be the tenant of the mortgagor himself, or the tenant of his grantees, and therefore the mortgagor's grantees immediate or remote, are included within the meaning of the words "his personal representatives."

3. ———: ———: ———. A mortgagor who, after default in payment and after notice of sale under the terms of the mortgage,

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but before sale, leases the mortgaged premises to a tenant who knew the facts, is not entitled to the benefit of the proviso in section 2841, R. S. 1909.

Appeal from Grundy Circuit Court.—*Hon. G. W. Wanamaker,* Judge.

REVERSED AND REMANDED (*with directions*).

Hall & Hall for appellants.

R. E. Kavanaugh for respondents.

TRIMBLE, J.—The suit herein is in replevin for the possession of corn grown upon a certain farm in the year 1915. Defendants prevailed in the trial court and plaintiff has appealed.

It was agreed in the trial court that on May 9, 1914, Ruth Clark and husband owned the farm in question subject to a $7000 deed of trust which they had assumed and agreed to pay. On said date they gave a second deed of trust on said land to Edwin R. Sheetz, Trustee for the Jamesport Bank to secure a loan for $1000. The Clarks owed plaintiff, the Citizens State Bank of Trenton, money borrowed of it which they failed to pay. Suit was brought, judgment obtained and execution levied upon the land for said money. The land being about to be sold, the Clarks deeded the land to the defendant, Ross Knott, and the latter, with his father and co-defendant herein as security on the injunction bond, enjoined and stopped the sale.

In settlement of this injunction suit and of the Clark debt, Ross Knott and wife gave plaintiff a deed of trust on the land for $1050, subject to the two former deeds of trust already thereon.

The second deed of trust, the one held by the Jamesport Bank was foreclosed on August 23, 1915. The plaintiff bank, in order to protect its loan, procured one, Arnote, to attend the sale and bid on the land under an agreement that if he became the purchaser at the foreclosure sale he would pay plaintiff at the rate

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of $40 an acre for the land. He attended the sale and bid the land in at the amount of the debt and cost of sale and received a trustee's deed therefor.

At the time of the sale there was 100 acres of corn growing on the land, being cultivated and raised by four tenants who had rented the land for half grain rent.

After Arnote had purchased the land at the foreclosure sale he assigned his interest, whatever it was, in said corn to the plaintiff bank. The amount for the land at $40 per acre was computed and after deducting therefrom the amount of the first mortgage and the purchase price paid at foreclosure under the second, left due the Bank from Arnote the sum of $600. This amount the bank voluntarily credited upon Ross Knott's note to secure which the third mortgage had been given.

At the time of the foreclosure sale and at the time defendant Ross Knott's note was credited with the above-mentioned $600, the plaintiff bank knew that the four tenants who were raising and cultivating the corn and which was then green and growing on the land, were to have half of it for their services, but did not know that the other half, or the landlord's part, was claimed by anyone other than the owner of the fee, Ross Knott. It seems that after Ross Knott had given the third deed of trust he and his father orally exchanged possession of farms with each other, that is Ross Knott moved upon one of his father's farms and in exchange therefor the father, Allen Knott, rented the son's farm to the four tenants above referred to. The father, Allen Knott, had retired from farming and lived in town. It was conceded that he did not raise any part of said corn and, when the exchange of farms was made with the son, had no intention of farming the land himself.

After the foreclosure and after the assignment by the purchaser of his interest in the crop to the plaintiff bank, the tenants who had raised the corn received their half of it and the other half was being gathered and cribbed on the farm when Allen Knott laid claim

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thereto and began hauling it away. Thereupon plaintiff bank brought the replevin suit.

The defendant Allen Knott claims that under the oral exchange of farms between himself and his son he was a tenant of his son, and that, therefore, his half of the corn did not pass to the purchaser at the foreclosure sale, he claiming to be protected by the proviso to section 2841, Revised Statutes 1909, relating to the foreclosure of all right and equity of redemption to lands sold under mortgages and deeds of trust, said proviso reading as follows:

"Provided, that nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives."

The court overruled plaintiff's request for a peremptory instruction to find for it. Thereupon plaintiff submitted instructions embodying the facts as above set forth (about which there was no controversy), and stating that if such were found to be true then Arnote when he became purchaser at the foreclosure sale became "entitled to the corn growing on said land at the time of said purchase subject to the rights of the tenants who had corn growing on said premises at the time of said sale," and that if he sold and assigned his interest in said corn to the plaintiff bank, the finding must be for plaintiff; also that even if, under the agreement between Ross Knott and his father, the defendant Ross Knott assigned the use of his farm to his father Allen Knott, in exchange for the use of other lands of the father elsewhere, this would not entitle the father to the possession of the corn in controversy. The court refused to give said instructions as prayed but modified them by striking out entirely the portion hereinabove inclosed in quotation marks, and by inserting in said instructions the additional clause that "if the jury further find that Allen Knott acquired only such right and right to use from Ross Knott as Ross Knott has as

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owner, subject to the mortgage," then the finding should be for plaintiff.

We are somewhat at a loss to understand just what this additional clause inserted in the instruction means or what question was intended to be thereby submitted to the jury. Whatever may be its meaning, it would seem to be open to the objection that it apparently submits some sort of a legal question to the jury as to the effect of the mutual exchange of the use of the respective farms between father and son. However this may be, we do not think there was any question to be submitted to the jury, since there was no question of fact involved or disputed. The various deeds and the assignment of the purchaser's interest in the growing crop were all in writing and undisputed, and the only question involved was the question whether the father, Allen Knott, can be said to be a tenant within the meaning of said proviso in said section 2841, and that is a question of law.

It will be observed that the tenants who raised the corn have received their half, and plaintiff has made no claim to anything belonging to them. Under defendant's own testimony Allen Knott was not a tenant on the farm in the sense of that term as used in the statute. He did not have a crop of corn growing on said farm at the time of the sale. The arrangement between them was made with full knowledge on the part of both defendants of the existence of all three deeds of trust and of the liability of foreclosure before the maturing or severance of the crops.

Under the common law and prior to the statutory proviso, growing crops, forming a part of the realty and following the title thereto, passed with the land to the purchaser under foreclosure. [8 Am. & Eng. Ency. of Law (2 Ed.), 303; Wells v. Bente, 86 Mo. App. 264; 12 Cyc. 977; 8 R. C. L. 361; Reed v. Swan, 133 Mo. 100.] And this rule applied as well to the crops of the purchaser of the land from the mortgagor, with notice, as to the crops of the mortgagor himself. [Hayden v. Burkemper, 101 Mo. 644.] In Reed v. Swan, supra, it

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is said, p. 107, "we think it is plain that a lessee of the mortgagor under a lease made subsequently to the mortgage, with notice of the terms thereof, without the concurrence of the mortgagee, has no greater right to the crops, growing and unsevered, than the mortgagor himself would have after condition broken. The rights of the tenant can rise no higher than those of his landlord. [2 Taylor on Landlord and Tenant, sec. 537; Lane v. King, 8 Wend. 584; Walmsley v. Milne, 7 C. B. N. S. 115.]"

In Nichols v. Lappin, 105 Mo. App. 401, l. c. 404, it is said: "The proviso was appended to the above statute to protect tenants who happen to have growing crops when a foreclosure sale occurs, against losing the proceeds of their labor." And in Wells v. Bente, supra, p. 268, the court, in discussing what was meant by the above-mentioned proviso in the statute, says: "It is worthy of remark that in the discussion of this question the authorities constantly refer to whether this or that meaning contended for would be reasonable. Applying the foregoing to the statute in question, we are satisfied that the object of the statute was to protect the tenant who had the growing crop at the time of the sale of the land, whether he be the tenant of the mortgagor himself, or the tenant of his grantees; and that therefore the mortgagor's grantees, immediate or remote, were included within the meaning of the words, 'his personal representatives.' "

Since Allen Knott made the arrangement with his son with full knowledge of the liability of the land to foreclosure, the language used in Nichols v. Lappin, supra, at page 407, is likewise applicable here, viz: "It would scarcely be contended that if a mortgagor, after default in payment and after notice of sale under the terms of the mortgage, but before sale, should lease the premises to a tenant who knew the facts, the latter would have the benefit of the statute. That contention would enable the mortgagor to enjoy the proceeds of the incumbered land months after he had lost the title and the right to possession; for he might lease

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for cash instead of a share of the crop, as was done in the present instance." Suppose Ross Knott had deeded the land to his father instead of making the oral arrangement that he did, the father would have had no greater rights than his grantor, and clearly could not have claimed the right to hold his grantor's share of the crops. If so, it is difficult to see how he could have any greater claim by substituting himself in the owner's place by means of the oral exchange.

The language of the proviso in confining the protection afforded thereby "to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives" shows that the purchaser at foreclosure sale would acquire an interest in the crops growing on the land at the time of the sale, and the statute intended to protect only the tenants who grew or might grow crops on the mortgaged land that were unserved and formed a part of the realty at the time of the foreclosure.

We think that to allow defendants' contention would extend the statute beyond its evident purpose and intention, and enable a mortgagor to enjoy the proceeds of the incumbered land long after he has lost the title and the right to possession.

The judgment is, therefore, reversed and cause remanded with directions to render judgment in proper form for plaintiff. All concur.

THE HUBER MANUFACTURING COMPANY, Respondent, v. S. D. ELLIS and PARLEE ELLIS, Appellants.

Springfield Court of Appeals, March 11, 1918.

1. **CHATTEL MORTGAGES: Power of Sale: Notices.** Powers of sale in chattel mortgages must be strictly followed as to places and time of posting notices, and in all other particulars.

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2. ———: **Stipulations Drawn by Mortgagee.** A stipulation drawn by a mortgagee regarding change of place of sale to another county will not be added to by intendment so as to allow posting of notices in such other county contrary to the mortgage provisions.

3. ———: **Foreclosure: Place of Sale: Notices.** Where mortgagee obtained a stipulation that a sale be held in another county, but nothing was said as to where notices should be posted, posting of notices only in the county where the sale took place, where the mortgage expressly stated notice should be posted in the other county, rendered the sale void.

4. **USURY: Sales: Discounts.** That vendor offered to sell machinery for $2100 cash or $2400 on time notes did not render a chattel mortgage for $2400 usurious.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*, Judge.

REVERSED AND REMANDED.

Abington & Phillips for appellants.

Sheppard & Sheppard for respondent.

FARRINGTON, J.—The plaintiff (respondent) brought suit on six promissory notes which had been given it by the defendants who are husband and wife, defendants having purchased a threshing machine outfit and given these and other notes aggregating $2100 secured by chattel mortgage on the machinery. The same question being presented as to both mortgages the disposition of one will rule the case.

The point to be decided goes to the notice of sale under the chattel mortgage after default had been made in the payment of a part of the debt.

The chattel mortgage provided that in case of default plaintiff upon taking possession might proceed to sell the property at public auction to the highest bidder at Keener, Butler county, Missouri, first having given ten days' notice of the time, terms and place of sale, and the property to be sold, by posting three written or printed handbills in three public places in said county. The mortgage also provided that the mortgagee might

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become the purchaser at said sale. Keener is a small town in the northern part of Butler county. Williamsville is several miles north of Keener and is in Wayne county, Missouri.

After default the plaintiff and defendants entered into the following agreement or stipulation:

"We, S. D. Ellis and Parlee, his wife, hereby agree and consent that the property described in a chattel mortgage given by us to the Huber Manufacturing Company for $2100 dated May 22, 1915, may be sold at Williamsville, Wayne county, Missouri, instead of Keener, Butler County, Missouri, as provided in said mortgage. Dated this 26th day of May, 1916.

"S. D. Ellis,
"Parlee Ellis."

This came about by reason of the fact that it was easier to get the machinery to Williamsville than to Keener, and both parties agreed that it might be taken to Williamsville and sold there under the mortgage. In this stipulation to sell at Williamsville instead of Keener there is no mention made about any change in the character or the posting or the place of posting the notices of sale.

The plaintiff having taken possession of the property at Williamsville in Wayne county proceeded to post the notices of sale in Wayne county and posted no notice, as required by the terms of the chattel mortgage, in Butler county. The sale took place at Williamsville and the plaintiff bought the property for $900. After deducting certain expenses of the sale plaintiff gave credit on the notes given for the purchase price for what remained, and in this action seeks to recover the balance alleged to be due on said notes.

Defendants in their answer set up the failure to post proper notices of said sale, charged that the sum paid—$900—was a grossly inadequate price for the machinery, and asked credit for $2250, which they allege to be the value of the machinery taken and retained by the plaintiff in the manner hereinbefore described.

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The trial court by refusing defendants' requested instructions held that the sale under the chattel mortgage made at Williamsville was a valid sale, and gave an instruction for the plaintiff requiring the jury to find for the plaintiff for the amount due on said notes together with interest. Judgment was accordingly rendered for the plaintiff, and defendants have duly perfected their appeal and present the proposition as to the validity of the sale made at Williamsville in Wayne county under this chattel mortgage where there was no showing of any notices of sale as required by the chattel mortgage in Butler county.

The law is well settled in Missouri as well as elsewhere that the powers conferred by a chattel mortgage in order to pass title to a purchaser under a sale must be strictly followed, not only as to the places designated for posting notices and the length of time, but in all other particulars. The reason for this rule is that the powers exacted by the mortgagee which gives him authority to take the mortgagor's property and transfer title therein is a drastic measure not contemplating any supervision of a court and one simply of contract. [Schanewerk v. Hoberecht, 117 Mo. 22, 22 S. W. 949; Stine v. Wilkson, 10 Mo. 75; Thornburg v. Jones, 36 Mo. 514; Hutchins Hanks Coal Co. v. Land & Coal Co., 141 Mo. App. 251, 124 S. W. 1098; Sears v. Livermore, 17 Ia. 296, 85 Am. Dec. 564, 27 Cyc. 1474 and 1476; 7 Cyc. 109; 2 Jones on Mortgages, secs. 1827 and 1836; Jones on Chat. Mortgages (5 Ed.), sec. 795.]

The law as settled in this State should be strictly observed in applying it touching the giving of notices by publication. [Gray v. Worst, 129 Mo. 122, 31 S. W. 585; Cruzen v. Stephens, 123 Mo. 337, 27 S. W. 557.]

The contention of the respondent—that the subsequent agreement between the parties that the place of sale of this machinery should be a different place than that named in the chattel mortgage waived the requirement as to the place of posting notices of the sale—is not well taken. To begin with the chattel mortgage by definite and unambiguous language declares that the post-

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ing of the notices must be in Butler county and the stipulation as to the change of the place of sale in no way refers to or mentions anything concerning the method, place or manner of publication. This stipulation was prepared and drawn by the mortgagee and its words will be given their ordinary meaning and nothing will be added to that meaning by intendment. For this court to read into that stipulation a clause changing the place at which the notices of sale are to be posted would not only violate the law as declared in Liggett v. Union National Bank, 233 Mo. l. c. 601, 133 S. W. 299, and a long line of Missouri decisions holding that courts cannot make contracts for parties, but would change the specific and unequivocal terms of a written contract that the parties actually made. We must therefore hold that the sale made at Williamsville was void and that the defendants are entitled to take credit upon the debt for which they are sued in such an amount as they may be able to show the property was worth when taken by the plaintiff.

Respondent cites but one case to support the validity of the sale, the case of Darnall v. Darlington, 28 S. C. 255, 5 S. E. 620. That was where the mortgagee had taken possession of some mules on which he held a chattel mortgage and the mortgagor had defaulted in the payment of the debt. The chattel mortgage required certain notices of sale to be posted at a small town called Allendale. The mortgagee in that case took possession of the mules on a telegram received from the mortgagor instructing him to "take stock to Savannah and sell there." Following this instruction the mortgagee took the mules to Savannah, advertised for two days a sale, and sold them, applying the proceeds on the debt, and brought suit for the balance due. The defendant mortgagor set up the invalidity of the sale because the chattel mortgage was not complied with as to the posting of notices. The court in that case held that in view of the fact that there was no evidence to the effect that the sale was in any way unfair or that the property brought an inadequate price, and that the sale was made

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at Savannah on instructions and for the accommodation of the mortgagor, he had waived the provision as to the posting of notices at Allendale, and upheld the sale. Though some of the language of that opinion is contrary to the ruling we make in this case the facts are not altogether analogous, first, as to the question of the consideration paid at the sale, and second, the mortgagee in that case was carrying out the wishes and directions of the mortgagor rather than the wishes of the mortgagee. That case, it seems to us, was decided for the right party and could and we think should have been placed on the ground that the mortgagor was not directing him to sell the mules in Savannah (a large city in another State) under the terms of the chattel mortgage, but was directing him as an agent to take them to that market and sell them for him and apply the proceeds to the payment of the debt and that neither party had in contemplation that the sale to be made in Savannah was a sale under the chattel mortgage, and that the claim made by the defendant in that case that it was under the chattel mortgage was an afterthought. In any event the case can in no way control the rule in Missouri as we have hereinbefore declared.

The appellants raise the novel proposition that because the plaintiff was willing to sell the machinery originally to the appellants for the sum of $2400 on time notes drawing five per cent interest, as it did, or for the sum of $2100 cash, the transaction, as closed, was usurious and the chattel mortgage void. Of course no authorities are cited to support this claim and it is without merit. To deny a seller the right to take a less amount in cash for an article than he would when sold for payments on time would bar to merchants a very beneficial instrument of commerce known as discounts.

For the reasons hereinbefore stated the judgment is reversed and the cause remanded. *Sturgis, P. J.*, and *Bradley, J.*, concur.

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FRANK RUEDIGER, Respondent, v. ROY DENNIS et al., Appellants.

Springfield Court of Appeals, March 11, 1918.

1. **FRAUDS, STATUTE OF: Delivery and Acceptance: "Accept and Actually Receive."** The expression "buyer shall accept . . . and actually receive" in the Statute of Frauds (Rev. St. 1909, sec. 2784), providing that if a vendee of personalty shall accept and actually receive the property no memorandum or cash payment is necessary to bind him for the purchase price, means that there shall be a surrender by the seller of all dominion and control over the thing sold and an acceptance and receipt by the purchaser with intent to absolutely appropriate it as his own; the test being whether the vendor has lost his lien.

2. **SALES: Transfer of Title.** Where property is turned over to vendee, cash on delivery, or where nothing is said about payment, there is no transfer of title until price is paid.

3. **COMPLETED SALE.** There can be a completed sale, even though counting, weighing, or measuring is to be done to determine the amount due.

4. **FRAUDS, STATUTE OF: Delivery: Acceptance.** It is not essential that absolute legal title to goods shall pass in order to render effective under the Statute of Frauds (Rev. St. 1909, sec. 2784) an acceptance and receipt of goods; but such acceptance and receipt will sustain the contract, although absolute legal title is only to pass on the happening of some event, and such may be true even when a seller has the right of stoppage *in transitu*.

5. **SALES: Delivery: Question for Jury.** Where there is evidence *pro* and *con* as to delivery and acceptance of chattels, the question is for the jury. Whether there was delivery and acceptance of a bull which died on the way to the scales to ascertain the price, *held*, under the evidence, for the jury.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker*, Judge.

AFFIRMED.

Garner, Lamar & Lamar for appellants.

Curtis & Evans for respondent.

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FARRINGTON, J.—Plaintiff recovered a judgment against the defendants for the value of a bull alleged to have been sold, delivered and accepted by the defendants.

The answer filed was a general denial.

The case was tried to a jury which returned a verdict for plaintiff.

There is but one point made on this appeal: That under all the evidence the plaintiff failed to make a case and that defendants' instruction in the nature of a demurrer to the evidence should have been given.

There is no serious difference over what the law is that is to govern this case. Defendants say there is nothing in the record evidencing an acceptance and actual receipt of the bull by them as purchasers such as will make the transaction conform to the requirements of section 2784, Revised Statutes 1909, and that for the reason the sale was void and no recovery can be had. It is admitted there was no cash payment, nor any written memorandum, and that if a sale was made it must depend upon that part of the statute which requires that the buyer shall accept and actually receive and upon the fact that he did accept and actually receive the bull from the hands of the seller, the plaintiff. The expression in the statute "buyer shall accept and actually receive" undoubtedly means that there must be a surrender by the seller of all dominion and control over the thing sold and an acceptance and receipt by the purchaser with intent to absolutely appropriate it as his own. It must be of such a character as to unequivocally take the property from any control over it by the seller and place it under the absolute and exclusive dominion of the buyer. The test for determining whether there has been an acceptance and actual receipt by the purchaser within the meaning of the Statute of Frauds, the property remaining in the possession of the seller, is whether or not the vendor has lost his lien. [Benjamin on Sales, sec. 187; Sotham v. Weber, 116 Mo. App. 104, 92 S. W. 181; Ficklin v. Tinder, 161 Mo. App. 283, 143 S. W. 853; Kirby v. Johnson, 22 Mo. 354; Hollrah-Dieckmann Refrigerator

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& Fixture Co. v. St. Louis House & Window Cleaning Co., 186 Mo. App. 207, 171 S. W. 576.] Undoubtedly, as between vendor and vendee, the property having been turned over to the vendee, where the express terms of the sale are cash on delivery, or where nothing is said about when the payment will be made, it will be construed to be cash on delivery, and there is no transfer of title until the purchase price is paid. [Ballard v. First Nat. Bank of Bolivar,—Mo. App.—,195 S. W. 559; Strother v. McMullen Lumber Co., 200 Mo. 647; 98 S. W. 34; Sharp v. Hawkins, 129 Mo. App. 80, 107 S. W. 1087; Frazier v. Railway Co., 104 Mo. App. 355, 78 S. W. 679; Howard v. Haas, 131 Mo. App. 499, 109 S. W. 1076; and Ficklin v. Tinder, supra.]

There can be a sale complete even though the counting, weighing or measuring of the thing bought is to be done, and there can be a sufficient acceptance and actual receipt of the article purchased by the buyer though there remains the ascertainment of the weight or measurement of the thing sold for the purpose of determining the amount which is to be paid. [Bass v. Walsh, 39 Mo. 192, 20 Cyc. 247; Ficklin v. Tinder, supra, l. c. 288.] As said in 1 Meachem on Sales, sec. 394: "It is not essential that the absolute legal title to the goods shall pass to the purchaser at the time of the making of the contract of sale, in order to render effective, under the statute, an acceptance and receipt then occurring, but such acceptance and receipt will sustain the contract, although the absolute legal title is not to pass to the purchaser until the happening of some event or the performance of some condition subsequent." There can be a sufficient acceptance and actual receipt of the property by the buyer even though the seller has the right of stoppage *in transitu* [1 Reed on the Statute of Frauds, sec. 281, pp. 432, 433.]

Where there is evidence pro and con as to a delivery and an acceptance the question is one for the jury. [Hollrah-Dieckmann Refrigerator & Fixture Co. v. St. Louis House & Window Cleaning Co., supra; Sotham v. Weber, supra.]

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With these principles in mind we will examine the record to see whether there is any substantial evidence to support the plaintiff's contention that the defendants accepted and received the bull at plaintiff's farm and that the sale was consummated on such acceptance and receipt and that the purchase price was to be paid subsequently—after the bull had been driven to Mansfield and weighed on the scales there.

Defendants' evidence, if believed, established that the defendants bought the bull to be delivered in Mansfield and that payment was to be made when delivered in Mansfield and his weight ascertained on the scales there.

Plaintiff testified that one of the defendants came to his farm and offered five and one-half cents a pound for this bull, his weight to be determined on the scales at Mansfield. Plaintiff's version is that the matter of delivery at the scales in Mansfield was raised by the defendant who bought the animal, and that he declined to make such a sale but stated to the defendants if they wished to buy they would take the stock at the farm, to be weighed at Mansfield, otherwise there would be no sale, and that defendants then agreed to come and take the stock at the farm and that he, plaintiff, agreed to permit his hired man to assist in driving this stock to the scales. Plaintiff states that he kept the bull about a week when a brother of one of the defendants came to the farm and announced that defendants had sent him for the stock (a cow having also been purchased about which there is no controversy), and that thereupon he turned over the stock to this man sent by the defendants, who, with the aid of plaintiff's hired man drove them toward Mansfield.

It appears that the bull became overheated and that when one Hensley's farm was reached on the route the bull was put in a lot where he stayed several days and then died. The cow which was taken from plaintiff's farm at the same time was taken on to Mansfield, weighed, paid for, and a receipt taken for payment.

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It is shown that plaintiff asked Hensley to water and care for the bull while there. Plaintiff explains this by saying that he merely made the suggestion as a humane act.

There is evidence in this record that under the sale which was made the delivery and acceptance of the bull was to take place on plaintiff's farm, the value to be determined later after he had been driven to Mansfield by the defendants and his weight ascertained, and that, carrying out such agreement, the defendants sent their agent to plaintiff's farm where the bull was placed in his possession and started to Mansfield accompained by one of plaintiff's hired men who plaintiff says he had agreed with defendants to furnish. With this evidence, given by the plaintiff, it cannot be said that there was not some substantial evidence supporting the verdict which found that plaintiff had sold the bull to defendants with the understanding that the delivery and acceptance had taken place on his farm and that such delivery and acceptance had taken place when defendants' agent appeared at plaintiff's farm and started with the animal to Mansfield. Under the very terms of the contract, as testified to by the plaintiff, the sale was not cash on delivery, but delivery and acceptance at plaintiff's farm and payment of the purchase price waived until the amount could be determined subsequently, as agreed to, when the weight was ascertained at Mansfield.

There is substantial evidence from which a jury could reasonably find that the sale was cash on delivery when the animal was delivered at Mansfield; or that the sale was not cash on delivery, but that it was completed, and the possession handed over and accepted by the defendants when their agent was given charge of the bull at plaintiff's farm. The jury inclined to the latter view and returned a verdict for the plaintiff.

As no other points are raised concerning the trial or judgment other than the one discussed, the judgment will be affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

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MARY E. HORINE and R. W. HORINE, Respondents, v. THE ROYAL INSURANCE COMPANY (LIMITED) OF LIVERPOOL, Appellant.

Springfield Court of Appeals, March 11, 1918.

1. **REFORMATION OF INSTRUMENTS: Right to Remedy: Proof Required.** To warrant reformation of instrument for mistake, the mistake must be mutual, and the party asserting such mistake must prove it by evidence which leaves no reasonable doubt in the mind of the court, though the same degree of proof required in criminal cases is not necessary.

2. **INSURANCE: Evidence: Sufficiency.** Evidence *held* to show mutual mistake in an insurance policy upon property of the wife drawn in favor of the husband which the insurer's agent told plaintiff was valid in spite of the variance in ownership.

3. **REFORMATION OF INSTRUMENTS: Mistake: Character of Mistake.** Where the owner of property told the agent on seeing the policy that she owned the property and the policy was in the husband's name and the agent assured her that the policy protected her against loss, there was a mutual mistake of mixed law and fact warranting reformation of the policy.

4. **INSURANCE: Fire Insurance: Instructions: "Total Loss."** In an action on fire policy, instruction that if the building could have been repaired with materials of like kind and quality, and so put in as good condition as before the fire, plaintiff could recover only the cost of repairing the building, sufficiently defined "total loss" in a negative way.

5. **APPEAL AND ERROR: Scope of Review.** In action on fire policy, where there was substantial evidence of total loss, the finding of fact that there was a total loss cannot be overturned.

6. **INSURANCE: Instructions: Total Loss.** In action on policy insuring a barn consisting of a main building and several extensions, a general instruction limiting recovery to cost of repairs if the building could have been repaired was sufficient, and it was not necessary to instruct on partial loss as to the various additions to the building.

7. **———: Fire Insurance: Total Destruction of Building: "Wholly Destroyed."** There need not be an absolute extinction of all the parts of a building in order for it to be "wholly destroyed."

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8. **FIRE INSURANCE: Total Loss.** In view of R. S. 1909, sec. 7020, as to valued policies, one whose barn was insured in several companies could recover on a valued policy the full amount of the policy regardless of other insurance.

9. **EVIDENCE: Admission: Testimony.** Where insured testified that after a fire a new barn was built which cost $900, but there was no evidence that it was substantially the same as the old barn, there was no admission that the old barn was duplicated for $900, which was less than the face value of the policy.

Appeal from Lawrence Circuit Court.—*Hon. Charles L. Henson,* Judge.

AFFIRMED.

Goad & Schmook for appellant.

H. H. Bloss for respondents.

FARRINGTON, J.—This is an action to reform a three-year term policy of fire insurance, and to recover on the policy as reformed. The circuit court, a jury being waived, reformed the policy as prayed and then gave judgment for the face value of the policy and defendant appeals.

The petition was in two counts. The first, in equity, in the name of R. W. Horine and Mary E. Horine, his wife, asks for a reformation of a policy issued September 6, 1915, by defendant to R. W. Horine, as assured in the aggregate sum of $2300 covering these items: $500 on dwelling house; $300 on household goods; $1000 on a shingle roof frame building and additions occupied and to be occupied as a private horse stable, or carriage house or barn; and $500 on horses and cows contained therein; all located on certain lots in Aurora, Missouri. It is alleged that when the policy was delivered to the wife she called defendant's agent's attention to the fact that the policy was written in the name of her husband whereas the title to the property was in her, and that the agent replied that it would make no difference whether the title was in R. W. Horine or Mary E. Horine and that if any loss occurred

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it would be promptly paid; that the wife, relying on said statement and believing it to be true was induced thereby to pay to defendant the premium of $18.40 and was also induced thereby to not make any further effort to secure other insurance or to have said policy changed so that the name of the assured would be the same name in which the title vested; that the name of the assured in the policy "was by reason of the fault, misconduct and acts of the defendant itself incorrectly stated and given" without any fault on the part of the plaintiffs; that the title to said real estate was on September 6, 1915, and ever since has been in plaintiff wife; and that the plaintiff husband disclaims any right to the proceeds from the policy if the same shall be paid or collected in this suit or otherwise by his co-plaintiff. It is then alleged that on August 4, 1916, the barn was totally destroyed by fire, and the prayer is for reformation of the policy so that the name of plaintiff wife may appear as assured.

The count at law asks for recovery in the sum of $1000.

The answer to the first count admitted the issuance of the policy to R. W. Horine and that Mary E. Horine was then and is now the owner of said real estate but averred that defendant had no knowledge or notice that she was the owner, or that her husband was not the owner thereof, until after the fire; that as soon as it was so advised it tendered, before suit, to plaintiffs, the premium on such policy and the one of which it was the renewal with interest from date of each policy; and it denied specifically every other allegation, denying that it made any other contract or had any other agreement or understanding with plaintiffs, or either of them than the one expressed in the policy.

The evidence as to what transpired before and at the time of the delivery of the policy in question is in irreconcilable conflict. The plaintiff's version was that the agent took it upon herself to write up the policy as it was written without any directions whatsoever from either plaintiff, and that when the agent

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brought the policy to the Horine home the conversation occurred which is recited in the petition and this is positively testified to by both Mary E. Horine and Alta Gatts, her daughter, whereupon the premium was paid. Both witnesses (last above mentioned) testified that when the agent delivered the policy Mary E. Horine looked at it and then asked the agent would it make any difference that the title was in her name and the policy in the name of her husband, and that the agent replied that it would not make a particle of difference because they (the husband and wife) did not do business separately. The husband was not present. Defendant's version was altogether different, being that this policy was a renewal of a policy written September 6, 1912, covering the same subject-matter, between the same parties, same amounts and all; that the husband in the wife's presence had given directions to defendant's local agent's clerk, Mrs. Oldaker, how to write the original policy, and that it was written in the name of R. W. Horine and delivered and remained in the hands of the Horines in that form during the entire three-year period; that Mrs. Oldaker went to inspect the risk before preparing the renewal policy, as required by the rules of the company, and inquired of the wife (the husband not being present) whether any change should be made in the policy in any way from the original policy and was told there was none; that the renewal policy was subsequently mailed, not delivered in person, and that no such conversation ever occurred as detailed by Mrs. Horine and her daughter, and that some time after the policy was issued Mrs. Horine came to the insurance company's office and gave her check for $18.40 premium. It thus appears that the testimony is in square conflict.

As stated, the husband was made a party to this suit merely for the purpose of disclaiming any interest in the loss on the barn. It is undisputed that the title was in the wife and that the policy contained several items some of which covered property owned by the husband; that is, some of the items in this policy covered

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property actually owned by the husband. It is admitted that the policy was merely a renewal of one that had been in force for three years in practically the same condition.

In order to reform a written instrument it is said: "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only a certainty of error." [Sweet v. Owens, 109 Mo. l. c. 7, 18 S. W. 928.] "Every presumption is in favor of the instrument as it is, and the evidence must be unequivocal to show both that an error was committed and also its precise character." [State ex rel. to use of Frank v. Frank, 51 Mo. l. c. 99.] "A court of equity has jurisdiction to reform a policy of insurance, or other written contract, upon parol evidence, when the agreement really made by both parties has not been correctly incorporated into the instrument, through accident or mistake, in the framing of it; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties, as to what the contract was intended to be, and upon testimony entirely exact and satisfactory; and it must appear that the mistake consisted in not drawing up the instrument according to the agreement that was made." [Tesson v. Atlantic Mut. Ins. Co., 40 Mo. l. c. 36.] The burden is upon the party asserting the mistake, and the mistake must be mutual. [Parker v. Vanhoozer, 142 Mo. l. c. 627, 44 S. W. 728; see also, Aetna Life Ins. Co. v. American Zinc, L. & S. Co., 169 Mo. App. l. c. 561, 154 S. W. 827; Greditzer v. Continental Ins. Co., 91 Mo. App. 534.] It is not claimed in the case at bar that there was any fraud or any misrepresentation of a material fact.

The mistake alleged, relied upon, and testified to by the plaintiff and her witness, her daughter, was the legal effect of the policy on her interest and property in such policy when written in the name of her husband, her testimony being that she called the agent's attention to the fact that the property belonged to her and that

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the insurance was written in her husband's name, and that the agent assured her that that insured her property.

In order for a chancellor to correct a mutual mistake where the mistake is one of fact, or one of mixed fact and law, or one existing because of a misunderstanding as to the legal effect of the language of the written instrument, the plaintiff asking for a reformation must show by clear and cogent proof that the mistake was mutual, and what the contract was which was intended between the parties and which would have been made were it not for such mistake. [Judson v. Mullinax, 145 Mo. 630, 636, 47 S. W. 565.] The evidence must be such as to leave no reasonable doubt in the mind of the court as to these points. [Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395; Hockstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.] And while it is said that the mistake must be proven beyond a reasonable doubt, the courts do not generally require the degree of proof required by the criminal law. [Southard v. Curley, 134 N. Y. 148, 30 Am. St. Rep. 643, 31 N. E. 330; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688.]

The rule in Missouri seems to be that the evidence must be clear, cogent and convincing; and while courts of equity are not prone to get entirely away from the common-law rule that oral evidence will not be permitted to vary or alter the terms of a written instrument, and the rule that a written contract is presumed to contain the whole contract entered into by the parties, they will reform an instrument where it is apparent (bearing in mind the solemnity of the written contract and the force that goes with it) that a mistake has been made in reducing the contract to writing that the parties intended to make; and in applying the equitable rule the courts have been inclined to use stronger expressions as to the theory upon which the cases should be decided than they have practiced in deciding the individual cases. Thus we see the expression that the chancellor must be convinced beyond a reasonable doubt, and that a mere preponderance of the evidence will not suffice,

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and the like. As we view the rule in equity, after taking into consideration the force of the written instrument and the solemn facts which it evidences, if the plaintiff has evidence which convinces the chancellor that notwithstanding these a mistake has been made, a reformation may be granted. In the case of Williamson v. Brown, 195 Mo. 313, 93 S. W. 791, where there was a conflict in the evidence, our Supreme Court granted reformation; and other Missouri cases may be found where the relief has been granted though there was conflicting evidence and though it could not be said that the mistake was proven beyond a reasonable doubt as we understand that expression in criminal law.

In the case at bar the plaintiff testified positively that she called the agent's attention to the fact, when this policy was delivered, that it was written in the name of plaintiff's husband whereas she owned the property, and plaintiff's daughter was as positive in her testimony that this occurred. It is also shown that prior to the delivery of the policy which is the basis of this action another insurance agent writing insurance on some of plaintiff's property called her attention to the fact that a policy of insurance should be written in her name and not in that of her husband, and it was therefore but the natural and reasonable thing for her to do when she did notice (as it was her duty to do) that this policy in suit was written in her husband's name to call the attention of the agent who was delivering it to that fact.

It is admitted by both parties that the real contract of insurance was to insure this barn in the name of the real owner. That, then, was the mutual intent of both parties and their mutual contract, and defendant's witness, the agent, admits and says that if she had known that the title was in the name of Mrs. Horine she would gladly have issued the policy to Mrs. Horine in her own name.

It is true that contracts of insurance are and should be personal contracts, and insurance companies

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have the right to say, we will insure this house if owned by you, but will not insure it if it is owned by someone else, because they have the right in making the contract to insure those in whom they have confidence as to honesty, integrity, and the like. But in this case that right amounts to nothing because the company says it had no objection to insuring Mrs. Horine but would gladly have issued the policy in her name had it known she was the owner.

We must hold with the trial court that the evidence of what the real contract between the parties was is established and that the instrument did not conform thereto or set forth that contract, all of which is so conclusive and convincing as to satisfy this court that a mutual mistake was made.

The next question: What was the character of the mistake made? It undoubtedly was not a mistake of fact. Nor was it a pure mistake of law, using that term in its narrowest sense. It was a mistake and a mutual mistake by the parties as to the legal effect of writing the name of R. W. Horine rather than that of Mrs. R. W. Horine in the policy. Plaintiff's evidence clearly shows that on calling the agent's attention to this fact she was assured that the effect of the policy as it stood was to insure her property which was in her name. And the courts have held that where the mutual mistake is as to the legal effect of the wording or language used in the contract, equity will relieve against such mistake by reforming the instrument. In Williamson v. Brown, supra, l. c. 332, our Supreme Court quotes with approval from 2 Pom. Eq. Jur., sec. 845, as follows: "In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, althqugh the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing." And our Supreme Court in that case discusses this question and sustains the view of Pomeroy.

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The question has arisen in a number of courts, all holding that a mistake as to the legal effect of an expression in or the language of a contract is a ground for reformation.

Thus, in the case of Woodbury Savings Bank v. Charter Oak Ins. Co., 31 Conn. 517, where the agent and the insured were mistaken as to the legal effect of writing the policy in the name of the mortgagor the court reformed the policy to carry out the real contract intended between them, and said: "There was a mutual mistake as to the proper mode of filling out the papers on both sides. The application was made out in the wrong name and the policy was made to the wrong person. But there was no fraud or misrepresentation. The papers would have been made out right if they had known how to do it, and it is immaterial whether the mistake was one of fact or of law."

In the case of Maher v. Hibernia Ins. Co., 67 N. Y. 283, there was a policy of fire insurance upon plaintiff's building described as "occupied as a dwelling." A portion of the lower story was occupied as a grocery and the residue of the house as a dwelling. In an action on the policy it was alleged and proven that the plaintiff and the local agent of the insurer who issued the policy knew at the time how the building was occupied and that they both intended to insure it as it was actually occupied, and both thought the terms used in the description in the policy would properly designate the occupation, and plaintiff, doubting whether the intention had been well carried out, called the agent's attention to the erroneous description and was assured by him that it made no difference, that the words used were apt and ample to express their meaning and intention. A reformation was granted.

In Taylor v. Glens Fall Ins. Co. (Fla.), 32 So. 887, where property which stood in the name of the wife and had been so insured, the wife died, and the husband acting for himself and the heirs asked that the policy be renewed, which was renewed in the name of the deceased wife, the fact that she was dead being

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known to the agent, the policy was by the court reformed, it being held that the real intention of the contract of insurance was to insure the property in the name of the owner.

In the case of Abraham v. North German Ins. Co., 40 Fed. 717, the company through its agent insured the property in question for the benefit of Abraham, the real owner thereof, and was paid by him for so doing. The company through its agent filled out the policy and so worded it that in legal effect it insured another man's interest in whose name the business was carried on. The court in disposing of the question of reformation said: "When, however, the mistake lies, not in a misunderstanding of the principles of the law as controlling the subject of the contract, or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one sense a mistake of law, is one that a court of equity will correct."

In Fink v. Queen Ins. Co., 24 Fed. 318, where a policy was issued to secure a mortgage of the insured property but by mistake was made in the name of the owner of the property instead of the mortgagee who was the contracting party for the insurance, and the property was destroyed by fire during the term of the policy, the court held that it would be against equity to not permit a reformation of the contract.

In Pitcher v. Hennessey, 48 N. Y. 415, where both parties misunderstood the meaning of the term "risk of navigation," the court held that the contract could be reformed to express their real intention, and held that when parties have made an agreement and there is no allegation of any mistake in it, and in reducing it to writing they by mistake, either because they did not understand the meaning of the words used or their legal effect failed to embody their intention in the instrument, equity will grant relief by reformation of the instrument and compel the parties to execute their agreement as they made it.

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In The Globe Ins. Co. v. Boyle, 21 Ohio St. 119, where a policy of insurance was issued on property devised to the testator's children and to his widow and executrix, the party insured in the policy was described as the widow executrix. The court held that reformation should be made so that the owners of the property, to-wit, the heirs and the widow, could recover the insurance, because the insurance was made for the benefit of the owners of the property and was so intended when the policy was issued.

It was held in the leading case of Snell v. Atlantic F. and M. Ins. Co., 98 U. S. 85, 25 L. Ed. 52, that the assent of one Keith to insure being made in his name was superinduced by representations of the company's agent that insurance in that form would fully protect the interests of the firm in some cotton, and that the representations were not made with any intention to mislead or entrap the insured. It was, however, evident that Keith relied upon the representations, and that it was not unreasonable to rely upon the larger knowledge and experience of the insurance agent in these matters. He trusted the agent with the preparation of a written agreement which should correctly express the meaning of the contracting parties. The case holds that in the absence of laches or negligence, equity will relieve against such a mistake. [See, also: Thompson v. The Phenix Ins. Co., 136 U. S. 287, 34 L. Ed. 408; Hunt v. Administrators of Rousmaniere, 26 U. S. 1, 7 L. Ed. 27; Eastman v. Provident Mut. Relief Assn., 65 N. H. 176, 23 Am. St. Rep. 29; Avery v. Equitable Life Assur. Soc. (N. Y.), 23 N. E. 3; Hartford Fire Ins. Co. v. McCarthy (Kas.), 77 Pac. 90; Western Assur. Co. of Toronto v. Ward, 75 Fed. 338; Sias v. The Roger Williams Ins. Co., 8 Fed. 183; Palmer v. Hartford Fire Ins. Co. (Conn.), 9 Atl. 248; Esch Brothers v. Home Ins. Co., 78 Iowa, 334, 16 Am. St. Rep. 443; Lansing v. Commercial Union Assur. Co. (Nebr.), 93 N. W. 756.]

Another case which the writer has read but cannot at this time find was where a lienor went to an insurance agent and asked to have his interest insured. The agent

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insured him, naming him as mortgagee. When the policy was delivered the insured called attention to the fact that he was not a mortgagee but had a mechanic's lien, whereupon the agent assured him that, written as it was, it covered his interest and protected him against loss by fire. In a suit to reform the contract the court gave the relief.

We must therefore hold, on abundant authority, that when Mrs. Horine informed the agent that the property was in her name and the policy was written in the name of her husband and was assured by the agent that it protected her against loss by fire, such a mistake occurred as will be relieved against, and the intention of the parties to insure the property for the real owner will be carried out by reforming the policy so as to make it conform to the contract which the parties understood they were making.

As stated, the court gave judgment for the face value of the policy, $1000.

The answer as to this branch of the case pleaded that at the time of the fire the plaintiff wife held another fire policy on the barn in question for $400 in the Hartford Fire Insurance Company issued June 15, 1915; that in her proof of loss made to the Hartford Company she stated the amount of loss to be $570 and thereupon received said $400 from the Hartford company; that $570 was the extent of the damage to the barn, which was only a partial loss, and that $570 was sufficient to repair the damage so that the barn would be in as good condition as before the fire; and that defendant had offered to pay and duly tendered to plaintiff the difference between the entire amount of such damage and $400 collected by plaintiff from the Hartford company, together with all the accrued costs of this action, and that it is still willing to pay such difference, $170, and costs.

The reply was a general denial.

The policy, which was filed with the petition, contained the usual provision that the company would not

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be liable for a greater proportion of any loss than the amount thereby insured shall bear to the whole insurance covering the property.

The policy also contained the provision that the damage should in no event exceed what it would cost the assured to repair or replace with material of like kind and quality.

Before the trial of this second count commenced defendant gave notice and duly made offer, under the statute, to allow plaintiffs to take judgment against it for $170 and accrued costs, defendant's theory being that the evidence would show that the damage could be completely repaired for $570 and that plaintiff wife had already collected the $400 from the Hartford company. This offer was not accepted.

The court made a specific finding that the allegations of the second count of the petition were true and that the barn was totally destroyed by fire.

Appellant does not contend there is no substantial evidence to support a finding of total loss. The contention is that the court committed reversible error in refusing to give two declarations of law which defined "a total loss."

The following declaration of law, given, was asked by the appellant:

"The court declares the law to be that the clause in the policy sued on, to-wit:

" 'This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.'

"is legal and valid, and the plaintiff is bound thereby. Therefore, if the court finds from the evidence that there was not a total loss *as defined in other instructions given,* and if the court further finds from the

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evidence that said building could have been repaired with materials of like kind and quality so that said building when so repaired would be in as good condition as before the fire, then plaintiff is limited in his right to recover in this case to such sum, if any, as the court finds from the evidence would be the reasonable cost to plaintiff to so repair the building with materials of like kind and quality, less such sum as the court finds from the evidence plaintiff has received from other insurance companies on account of said loss." (Italics are ours.)

The only other declaration of law given was that there could be no recovery of attorney fees or damages for vexatious refusal to pay.

We think the declaration of law given for appellant sufficiently covers the ground covered in the two declarations of law refused which affirmatively define what is a "total loss," whereas the declaration given puts it the other way, setting forth what is not a total loss. It is a rule often stated that in actions at law, tried by the court without a jury, declarations of law are important only as indicating the theory on which the case was tried. [Fairbanks, M. & Co. v. Coulson Stock Food Co., 151 Mo. App. l. c. 263, 131 S. W. 894.] As a matter of fact the declaration given for appellant goes farther than the two refused in that it omits all reference to whether there was much or little of the structure left standing, using the broad phrase "*if it could have been repaired.*" Since the court gave that declaration of law for defendant (appellant) it is in no position to complain of the refusal of the other two. The court, therefore, found that "it could not have been repaired" with materials of like kind and quality so that the building when so repaired would be in as good condition as before the fire. The issue throughout the evidence was clearly marked, plaintiffs' witnesses testifying to the complete destruction of the barn and defendant's witnesses saying it was at most a partial loss. While the evidence is thus in conflict as to the extent of the damage done by the fire, there is sub-

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stantial evidence of a total loss, so that this finding of fact is sustained and we are as powerless to overturn it as if it were embodied in a verdict of a jury upon a similar record.

As to the other declaration of law refused (to the effect that if the court found that the addition extending north from the west end of the main building remained standing and was uninjured after the fire there was not a total loss), the appellant did not bring up the evidence as to this in its abstract. However, the evidence is presented in respondents' additional abstract. According to defendant's own witnesses there were several parts to this barn; that is, it had been built and then added to from time to time. We think the declaration of law given covered the whole barn (which of course included the additions) and that it was not necessary for the court to thereafter take up each of the several parts and make separate declarations of law as to them. R. W. Horine testified that this shed extension was also damaged and that he could not even use it for the purpose of putting horses in there after the fire until he had placed new lumber on the roof, and no witness disputes this. Moreover, it was a very small extension. There need not be an absolute extinction of all the parts of a building in order for it to be "wholly destroyed." [Havens v. Insurance Co., 123 Mo. l. c. 422-423, 27 S. W. 718.]

Appellant says the court erred in excluding the evidence of one McGregor as it tended to prove only a partial loss. This evidence is not in the original abstract, nor in the respondents' additional abstract, but forms, along with a good deal more evidence, a sort of rear guard, appearing only in a third abstract for which appellant is sponsor. So far as we can see all of McGregor's testimony went in without objection except when he undertook to summarize what had been said previously by him, saying he supposed there was from one-third, not to exceed one-half loss on the building, and the court of course struck out that supposition.

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Because of its own course of examination of its witnesses the defendant is not entitled to complain of the fact that the court admitted evidence as to the cost of a new barn built on the site of the old one.

The question whether the plaintiff received more insurance for this barn than it was worth is not before us for decision if there was a total loss, and that finding is sustained. The "valued policy" law as to real estate (Sec. 7020, R. S. 1909) as it stands today was enacted in 1889 (Sec. 5897, R. S. 1889), and, as stated in Daggs v. Insurance Co., 136 Mo. l. c. 389, 38 S. W. 85, Sec. 5897, R. S. 1889, was "similar in principle" to Sec. 6009, R. S. 1879, which was construed in Havens v. Insurance Co., 123 Mo. l. c. 417, 418, 27 S. W. 718, wherein the Supreme Court held that where several concurrent fire policies have been written on a building which is wholly destroyed, each company is liable for the full amount of the policy. [See, Smith v. Insurance Co., 195 Mo. App. l. c. 384, 191 S. W. 1034.] While R. W. Horine testified that a new barn was built which cost $900, and another witness testified that it was built on the foundation of the old barn and that the roof of the new barn cost about the same as the roof of the old barn, there is no evidence that the new structure was substantially the same as the old one; indeed, defendant was objecting to this line of evidence on the ground that there was no showing that the two structures were substantially the same. Therefore it cannot even be said that plaintiffs conceded that the barn was duplicated for $900.

It follows from what has been said that the judgment must be affirmed as rendered. *Sturgis, P. J.*, and *Bradley, J.*, concur.

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ROSCOE STEWART, Trustee in Bankruptcy of the Estate of CLIFFORD T. WETHERELL, Bankrupt, Respondent, v. B. B. ASBURY, Doing Business Under the Name of ASBURY MOTOR COMPANY, Appellant.

Springfield Court of Appeals, March 11, 1918.

1. **APPEAL AND ERROR: Review: Findings of Fact.** A finding of fact by the trial court in an action at law is, where supported by evidence, conclusive on appeal, in the absence of a showing of passion, prejudice or willful misconduct.

2. **BANKRUPTCY: Trustee: Authority of.** The trustee in bankruptcy is, under Bankruptcy Act July 1, 1898, chapter 541, sec. 67e, 30 Stat. 564 (U. S. Comp. St. 1916, sec. 9651), authorized to enforce the rights of creditors of the bankrupt to set aside liens which are void under the State law for want of recording.

3. ———: **Liens: Effect.** Under Bankruptcy Act July 1, 1898, sec. 67e, the effect to be given an unrecorded chattel mortgage, where possession of the article was not given the mortgagee, must be determined under the law of the State in which the case arises.

4. ———: **Validity: Want of Recording.** Under Revised Statutes 1909, section 2861, declaring chattel mortgages to be invalid except as between the parties unless recorded before possession is taken, and sections 2887 and 2889, requiring conditional sales to be valid against creditors, the seller of a motor car, who received as payment notes reserving title and giving him a chattel mortgage, is not, having withheld the same from record, entitled to record the same and take possession of the car as against creditors whose claims had meantime arisen, so where the debtor became a bankrupt a few days after the seller took possession, his lien is subject to attack by the trustee in bankruptcy.

Appeal from Greene Circuit Court.—*Hon. Guy D. Kirby*, Judge.

AFFIRMED.

Oliver J. Page for appellant.

Stewart & Goad for respondent.

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FARRINGTON, J.—The plaintiff, trustee in bankruptcy of the estate of Clifford T. Wetherell, recovered a judgment against the defendant for $424, from which defendant has appealed.

The petition contained three counts. The first count was brought on the theory that defendant had obtained a preference within four months prior to the time of the filing of the petition in bankruptcy, and that he knew that in taking the property, an automobile, on an indebtedness due him, he was receiving a preference, or had reasonable cause to believe he was receiving a preference out of the property of the bankrupt. The first count was based on preferences such as are recoverable under section 60 B of the Federal Bankruptcy Act. The second count was based on section 67 E of the act. The third count was to recover some payments of money which had been made within four months prior to the institution of bankruptcy proceedings.

The court found for the defendant on the first and third counts, and rendered judgment on the second count for the trustee for the amount hereinbefore mentioned.

It is pleaded and shown by the evidence: That on January 8, 1916, Clifford T. Wetherell filed a petition in bankruptcy which was referred to a referee, and that an adjudication of bankruptcy was duly made. That plaintiff, Roscoe Stewart, was the duly elected trustee. That the debts proven against the estate amounted to $6320, and that the debts scheduled by the bankrupt amounted to $7860. That the total assets turned over to the trustees and in his hands did not exceed the sum of $500. That on May 1, 1915, defendant sold to Wetherell an automobile, the regular price of which was about $1100, but that the selling price in this transaction was $960. There was $280 cash paid when the car was delivered on May 1, 1915, the balance of the purchase price being evidenced by promissory notes of $60 each due on the first of each month. These notes undertake to retain title in the defendant, the payee therein; in other words, there was a conditional

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sale made by which the title to the car was retained in the seller and the notes provided that the payee could take possession of the automobile on default and sell it and apply the proceeds on the payment of the debt. It is further shown that between May 1, 1915, when the notes which retained title in the vendee and may either be treated as a chattel mortgage or as a conditional sale agreement, and the day on which the automobile was delivered to Wetherell, and January 6, 1915, Wetherell obtained credit in his business (which was a delivery service concern) of something like $6000. It is further pleaded and shown that of the $6320 proven, all the creditors to whom this amount was owing had become Wetherell's creditors during the time dating from when the notes had been given and withheld from record and during the time that Wetherell had the car in his possession. It is also shown that on the very day Wetherell was preparing his schedule in bankruptcy defendant filed his notes and took possession of the car, and that he later sold the car and applied the proceeds of the sale on the purchase money indebtedness.

There is sufficient evidence to support the judgment as to the amount allowed—$424. The automobile had been run something like eight months and the value was placed at less than half its original cost. In fact, there is little evidence upon which a judgment for a less amount could have been rendered. Nevertheless, there being sufficient evidence upon which to sustain the amount allowed, the judgment being one of a court of law, the appellate court is bound by its finding in the absence of a showing of passion or prejudice or willful misconduct on the part of the trier of the fact. The cases cited by appellant bearing on the preponderance of the evidence are therefore inapplicable to this case.

Appellant has misconceived the theory on which the court found judgment in the case as his brief, under point two, indicates that he conceived the judgment to have been rendered under the first count of the petition which deals with a knowledge or a sufficient knowledge to charge notice of insolvency at the time the alleged

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preference was taken. The court found for the defendand (appellant) on that count, and hence the cases cited under that point are entirely inapplicable to the issue before us.

There is no question that the Federal Bankruptcy Act empowers a trustee to enforce the rights of creditors of the bankrupt to set aside liens which are void under the State law for want of recording or for other reasons. [Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412; In re Bothe, 173 Fed. 597, Landis v. McDonald, 88 Mo. App. 335; Blake v. Meadows, 225 Mo. 1, 123 S. W. 868.]

Section 2861, Revised Statutes 1909, declares chattel mortgage where the possession of the mortgaged article is not given to the mortgagee is to be determined by the law of the State in which the case arises. [7 Corpus Juris, "Bankruptcy," sec. 282; Remington on Bankruptcy, secs. 1140, 1141; In re Wade, 26 A. B. R. 169, 185 Fed. 664.]

Section 2861, Revised Statutes 1909, declares chattel mortgages to be invalid unless the mortgage is recorded or possession of the mortgaged property is taken by the mortgagee except as between the parties to the instrument. And sections 2887 and 2889, Revised Statutes 1909, require, in order to be valid and binding as against creditors, that instruments evidencing conditional sales be filed of record.

It has long been the law of this State that a creditor who extends his credit to his debtor at a time when there is a chattel mortgage or conditional contract creating a secret lien on property in the hands of the debtor ostensibly his cannot be defeated by the mortgagee or vendor taking possession thereof under the mortgage or conditional contract, or filing the same for record. [Meet & Rountree Dry Goods Co. v. Brown, 73 Mo. App. 245; Landis v. McDonald, 88 Mo. App. 335; Williams v. Kirk, 68 Mo. App. 457; Blake v. Meadows, supra; Harrison & Calhoun v. South Carthage Mining Co., 95 Mo. App. 80, 66 S. W. 963; Hardin v. Bank of Centralia, 177 Mo. App. 44, 163 S. W. 306; Studebaker

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Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., supra; Hundley & McDonald Dry Goods Co. v. The Kidder Savings Bank, 72 Mo. App. 226; Pew v. Price, 251 Mo. 614, 156 S. W. 338; In re Wade, supra; First National Bank of Buchanan County, St. Joseph v. Connett, 142 Fed. 33; McElvain v. Hardesty, 169 Fed. 31; In re Bothe, supra.]

As heretofore stated, the judgment in this case was not upon the count based on section 60 B but upon section 67 E of the Federal Bankruptcy Act, and the undisputed evidence in the case showing that practically all the creditors who are represented by the trustee extended credit to Wetherell from May 1, 1915, to January 6, 1916, during which time the defendant's notes or chattel mortgage was not on record and during which time Wetherell was possessed of the automobile and was thereby given a false basis for credit, such creditors cannot be defeated in their claims against this property though their trustee by the defendant creditor filing his mortgage and taking possession of the car subsequent to the extension of credit by those whom the trustee represents.

The judgment rendered accords with the law of this State as well as the general law governing such transaction, is clearly for the right party, and is therefore affirmed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

JOSEPH BATHE, Respondent, v. MOREHOUSE STAVE and MANUFACTURING COMPANY, Appellant.

Springfield Court of Appeals, March 11, 1918.

MASTER AND SERVANT: Injuries to Servant: Knowledge of Danger. Where a servant, equalizing stave bolts by pressing a frame holding the bolt against two saws, had eighteen inches of the bolt on which he could safely place his hand, knew a belt was apt to come off causing the bolt to roll back, and that if he held his hand at a certain place on the bolt it was apt to be caught, but failed to guard against the danger, his negligence barred recovery for a resulting injury.

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Appeal from Butler Circuit Court.—*Hon. J. P. Foard,* Judge.

REVERSED.

Sheppard & Sheppard for appellant.

Gloriod & Ing for respondent.

FARRINGTON, J.—The plaintiff recovered a judgment for $300 damages on account of mashing the end of the third finger on his left hand. The defendant brings its appeal here and among other things contends that its demurrer to the evidence should have been sustained because under the most favorable view of the evidence the plaintiff was guilty of contributory negligence barring a recovery. As we agree with this contention it will only be necessary to set forth the evidence which plaintiff claims made a case for the jury.

The plaintiff, an employee of the defendant, was engaged in equalizing stave bolts. This is done by a machine simple in its make-up and operation. It consists of two circular saws on the same shaft, thirty-two inches apart, revolving toward the front of the machine which plaintiff faced while standing at his work. These two saws necessarily worked together and were driven by a belt which was run on a pulley. The bolt of wood to be sawed was placed on a frame, hinged at the bottom, and at the top was held together by two metal arms on which rested the block of wood to be sawed by both saws at once. These two arms, when the work of sawing was in progress, were horizontal to the floor of the building, and were about eighteen inches apart. The width of these metal arms was something like an inch and a half or two inches. There was nothing between these two arms. The plaintiff says that he placed the bark side of the log, or the rounded part of the bolt, down, and then held it firmly with both hands and pushed the entire frame forward so that the saws engaged the bolt of wood, sawing off the ends. He testified that when the saws would begin to work on the edge of the stick they first came

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in contact with the tendency was to pull the stick downward and towards the saws which necessarily tended to lift the back side of the stick, its rounded condition on the bottom making it like a rocker, but that after the saws had penetrated half way through the stick the tendency was for the stick of wood to be pushed back toward the man holding it and not pulled forward toward the saws. As stated, all the space under the stick of wood was open except that taken up by the two metal arms on which the stick rested.

The charge of negligence is that the defendant failed to furnish the plaintiff a safe machine with which to work by reason of it permitting the belt which drove the two saws to become loose so that when the belt of wood was placed against the saws the belt would slip on the pulley and the saws would stop revolving which would tend to make the stick held by the operator rock or roll backward toward him.

The evidence shows that plaintiff had called the foreman's attention to the condition of this belt and to the fact that the saws would stop when the stick of wood was applied to the saws. The evidence further shows that this particular stick which was being sawed at the time of the injury had caused the belt to slip and the saws to stop just before he was injured. Plaintiff says that he asked the foreman to fix the belt, not because he thought it rendered the condition dangerous, but because it impeded his work as each time the saws would stop the stick would have to be started over again which caused a loss of time.

The evidence without doubt shows that the slipping of this belt would cause the bolt of wood to do exactly what it did when plaintiff's finger was mashed, and it is also shown that plaintiff knew and realized that it would do this if the belt slipped or the saws stopped from any cause. Notwithstanding, he placed his left hand on the stick so that when the saws did stop by reason of the belt slipping the bolt rolled back toward him, just as he said it would do and as he knew it would do, and mashed the end of a finger because he

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had placed his hand at a place where his finger, if the stick rolled back, would be caught between the stick and one of the metal arms on which the stick rested.

The evidence further shows without contradiction that there was plenty of room for the workman to do this work and keep his hand between the arms so that if the stick did come back from any cause his finger would not be caught.

This is not a case where the plaintiff was required to determine whether he must quit because of a glaring and imminently dangerous condition or go ahead and take chances, but is a case where there was at hand, and easily at hand, a way in which to do the work so that the happening of the thing which did happen and which he knew was likely to happen would in no way effect or injure him. He knew that the belt was slipping, knew that when it slipped the saws would stop, knew that when they stopped the stick was liable to roll backward, knew that the stick lay on the arms, knew that if his finger was placed—when the stick rolled backward—in such a position that it would be between the stick and one of the arms that it would get caught, knew there was a space of eighteen inches between the two arms where he could place his hand and do the work without any danger of being caught, so that all that can be said of him, when he acted as he did with this knowledge, is that he inadvertently, thoughtlessly and carelessly placed his hand in a position where he could expect it to get hurt when it was unnecessary to do so. Such, in our opinion, is the very essence of negligence about which there can be no reasonable doubt or question. We have heretofore dealt with a case similar to this and cited and discussed the authorities in this State which hold one guilty of such conduct negligent. [Rogers v. Tegarden Packing Co., 185 Mo. App. 99, 170 S. W. 675.] Upon the authority of that case and the cases cited therein we hold that plaintiff carelessly contributed to his own injury which bars a recovery. The judgment is reversed. *Sturgis, P. J.*, and *Bradley, J.*, concur.

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ALBIN C. FRISBIE, Appellant, v. F. E. SCOTT and LEON H. SCHWALD, Respondents.

Kansas City Court of Appeals, March 4, 1918.

1. **CONTRACTS: Merger of into Deed: Covenants.** Where a deed has been executed annd accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. And although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor, the law remits the party to his covenants in his deed, and he cannot recover on the contract because of a failure of title by reason of a forged deed in the chain of title in the absence of fraud or mistake.
2. **APPEAL AND ERROR: New Trial: Reasons: Review.** Where the trial court, on motion for new trial, set aside the verdict without giving any reason therefor, the appellate court will affirm the judgment if any one of the various grounds stated in the motion are sufficient.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

AFFIRMED.

Ed. E. Aleshire for appellant.

Robert O. McLin for respondents.

TRIMBLE, J.—Plaintiff entered into a written contract with the defendant Scott whereby each agreed "to convey or cause to be conveyed by good and sufficient warranty deed" to the other or to his order, different lands variously located, all of which were specified in Schedules A and B attached to said contract, the former containing lands in Colorado belonging to plaintiff, and the latter naming lands in Kansas City, in Ripley county, Missouri, and in Texas, which the defendant was to convey or cause to be conveyed

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to plaintiff in exchange for his lands. The Texas lands consisted of two specified sections in Brewster county; and it is with reference to these two sections, or the failure of title thereto, that this lawsuit is concerned. Each party to the contract was to furnish to the other "full and complete abstracts of title, with the necessary certificates" etc. This was done and plaintiff's attorney examined the title to the lands he was expecting to get. The lands defendant was to convey or cause to be conveyed to plaintiff were not owned by him but stood in the name of various parties, and plaintiff knew of this fact.

By certain modifications of the contract, not necessary to explain, it was agreed that plaintiff should deliver his deed (with the name of the grantee omitted) to defendant Scott so that he might take it to Iowa and there close a deal he had with a man named Muntz by inserting Muntz's name as grantee in said deed; and defendant's deeds to the lands plaintiff was to get in exchange for his were deposited in escrow with the Missouri Savings Bank to be delivered to plaintiff if the Iowa deal went through. Among these deeds so deposited was one from G. O. Stansbury to the two sections of Texas land. The Iowa deal went through and plaintiff's deed to the Colorado land was delivered by defendant to Muntz and the Bank delivered to plaintiff the deeds held in escrow by it. The plaintiff acknowledged, in writing, and also in the testimony, that he accepted said deeds in performance of the exchange contract, among them being the Stansbury deed as aforesaid. This deed contained the usual warranty clause whereby Stansbury agreed to "warrant and forever defend" the title to the Texas land to plaintiff "against every person lawfully claiming or to claim" said land or any part thereof.

The abstract to the Texas land showed in the chain of title a deed dated January 30, 1913, from Henry W. Rokker to S. A. Jones and next a deed from Jones to Stansbury. And the abstract showed an apparently

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good title in Stansbury, so that a deed from him to plaintiff, when delivered, would seem to put the title in him.

Very shortly after the exchange, however, it was discovered that the deed from Rokker to Jones was a forgery and was so declared to be by a decree of the proper Texas court. Since the deed purporting to be from Rokker (the owner) to Jones was a forgery, the deed from Jones to Stansbury conveyed no title and hence Stansbury's deed to plaintiff was worthless and conveyed no title. Therefore, under the exchange contract plaintiff got no title to the Texas lands and lost the value thereof.

He brought this suit against Scott and the defendant, Schwald, who was in fact interested with Scott in said exchange contract though not signing it. The petition was originally in two counts, the first setting up the exchange contract and the warranty in the Stansbury deed, and apparently attempts to hold defendants on the covenant of warranty in said deed on the theory that, by virtue of the contract, Stansbury's deed was their deed and his covenant their covenant. In the second count no mention was made of the covenant in the deed but the cause of action was based alone upon the violation of the contract.

At the close of all the evidence plaintiff dismissed the second count. The court overruled defendants' demurrer and the case went to the jury, the plaintiff obtaining a verdict for $2560 and interest from date of suit. This the trial court, on motion for new trial, set aside without giving his reason for so doing. Thereupon plaintiff appealed.

If any one of the various grounds stated in the motion for new trial are sufficient, this would justify us in affirming the judgment. Among these grounds is one that the "verdict is against the weight of the evidence," and since we do not know what ground the court acted upon this may have been the one. And if there is any dispute in the evidence as to a material element

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in the case, this would require us to sustain the trial court's action. There is a very decided conflict in the evidence affecting the measure of damages which plaintiff claims to be the correct measure to be upheld. Hence we might very well affirm the judgment on this point alone.

However, it is asserted by plaintiff in the brief and, in a way, though not as specifically as might be desired, admitted by defendants that the real reason the court set aside the verdict was because he thought the petition stated no cause of action and that plaintiff was not entitled to obtain any recovery. Hence, we ought to dispose of this question as it will affect matters arising hereafter.

There was no charge of mistake nor was there any evidence of fraud or deceit on the part of defendants. If plaintiff's first count is a suit upon the covenant in the Stansbury deed, plaintiff's cause of action does not and cannot rest upon it alone, since the defendants did not sign the deed nor are they parties to it. The only way they can be connected with it, if at all, is by virtue of the exchange contract. But "contracts for the sale of land are in their nature executory, and generally, the acceptance of a deed in pursuance of their stipulations is prima facie an execution of the contract, and the agreement thereby becomes void and of no further effect." [Ball v. Willard, 9 Barbour, 641, l. c. 644.] On the next page the same authority says "the prima facie presumption of law, arising from the acceptance of the deed is, that it is an execution of the whole contract, and the rights and remedies of the parties, in relation to the contract, are to be determined by the deed, and the original agreement becomes void." It may be well to observe here that in the case at bar there is nothing tending in the remotest way to show that there were covenants in the contract collateral to the deeds to be delivered, and hence nothing to attack or destroy the prima-facie effect of the unconditional acceptance of Stansbury's deed under the contract. In Slocum

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v. Bracy, 55 Minn. 249, l. c. 252, it is said: "No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted various from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor; and, as in the sales of land, the law remits the party to his covenants in his deed, if there be no ingredient of fraud or mistake in the case, and the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title." And in Moyer v. Shoemaker, 5 Barbour 319, 321, it is said: "It is also a general rule that, while there is an open covenant of warranty, the remedy of the party must be confined to that." [See, also, Davidson v. Manson, 146 Mo. 608, 619, 620; Corrough v. Hamill, 110 Mo. App. 53; Herryford v. Turner, 67 Mo. 296.]

We are unable to see how the covenant of Stansbury in the deed, *combined* with defendant's contract to "convey or cause to be conveyed by good and sufficient warranty deed," can enable plaintiff to hold defendants, in the absence of fraud or mistake. Plaintiff, by accepting the Stansbury deed, agreed to receive the covenant of Stansbury in the place of defendants' covenant; and if the executory contract to exchange lands became *functus officio* upon the mutual delivery of the deeds, it would seem that it became as much *functus officio* for the purpose of tying defendants on to the covenant in Stansbury's deed as for any other purpose.

Nor can it be said that the contract is still alive because it has never yet been performed as to the Texas land, since the contract was to convey or cause to be conveyed by good and sufficient warranty deed and the deed from Stansbury conveyed no title, and, therefore, plaintiff can still sue for the damages caused by the

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failure to perform that part of the contract. The deed from Stansbury to plaintiff was a genuine deed and was a conveyance by good and sufficient warranty deed so far as Stansbury was concerned. It was sufficient to convey whatever title he had. The only trouble is there was a defect in his *title* owing to a forged deed in the prior chain of deeds to him. In Bull v. Willard, supra, at page 645, the court, in speaking of how to determine whether covenants contained in the agreement for the sale of land are collateral to those involved in the execution of the deed, or are so connected with it as to be at an end and become merged or satisfied in the execution of the deed, said: "I have not been able to fix upon a better criterion, upon that question, than that the covenant in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, *must not* look to, or be connected with the *title,* possession, quantity or emblements of the land which is the subject of the contract, and that if it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it." [Italics ours.] So that the fact of a forged deed in the chain was a mere defect in the title to said land and did not constitute a non-performance of the contract so as to leave it unperformed and with vitality sufficient to support a cause of action for non-performance. This might be the case had Stansbury's deed to plaintiff been a forgery for then that which plaintiff accepted as a deed would have been in reality no deed at all. In that event, too, doubtless fraud would have entered into the case so as to change the entire legal situation.

We are unable to see how, in the absence of fraud or mistake, plaintiff has any right of recovery against the defendants either on the covenant in the deed or on the contract, and hence affirm the judgment for that reason as well as for the other mentioned. The other judges concur.

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STATE OF MISSOURI at the Relation of THOMAS J. DOCKERY, Administrator of the Estate of LEWIS HUBBARD, Deceased, Respondent, vs. L. F. HUBBARD and EMMA HUBBARD, Appellants.

Kansas City Court of Appeals, April 1, 1918.

1. **ADMINISTRATOR: Partnership Estates: Liability of Bondsmen.** A and B were partners. A died and B qualified as administrator of the partnership estate. Before this estate was settled B died and C was appointed administrator *de bonis non* of the partnership estate and D was appointed administrator of B's individual estate. D sued the sureties on B's bond for the appraised value of the partnership estate and recovered judgment for the full amount. *Held* that the two estates (individual and partnership) having been placed in different hands the administrator of B's individual estate had no right to maintain such suit.
2. **PARTNERSHIP: Settlement of Partnership Estate: Common Law.** Upon the death of one of two partners, the right to settle the partnership estate vests in the surviving partner under the common law, and such right is not dependent upon the latter giving bond as required by section 91, Revised Statutes 1909. His failure, however, to give such bond might warrant the administrator of the deceased partner's individual estate, should one be appointed, in taking possession of the partnership assets.
3. ———: ———: ———. If the surviving partner does not qualify under the statute as administrator of the partnership estate, but acts merely under his common-law authority, then upon his death the right and duty of administering upon the partnership estate devolves upon his administrator.

Appeal from Adair Circuit Court.—*Hon. A. Doneghy*, Judge.

REVERSED AND REMANDED.

C. E. Murrell and *J. E. Reiger* for appellants.

Higbee & Mills for respondent.

TRIMBLE, J.—Prior and up to June ——, 1913, William Hubbard and Lewis Hubbard were partners owning and conducting a drug store. William died intestate, and on June 20, 1913, Lewis, the surviving partner, was appointed administrator of the partner-

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ship estate, gave bond, took charge of said estate and filed an inventory and appraisement thereof on July 7, 1913. The appraised value of the partnership estate was $2350.

Shortly thereafter Lewis Hubbard sold a half interest in the drug store to James F. Waddill for $1175 (for which he took notes), said amount being one-half of the appraised value; and thereafter Waddill and Lewis Hubbard continued the business as partners until December 8, 1913, when Lewis died. The sale of said one-half interest by Lewis to Waddill was made privately and no report of the transfer of the store to the new partnership of Waddill and Hubbard was ever made to the probate court.

On January 6, 1914, relator Dockery was appointed Administrator of Lewis Hubbard's individual estate. As such administrator he caused this suit to be brought on the bond given by Lewis Hubbard as Administrator of the partnership estate of Hubbard & Hubbard, defendants being sureties thereon.

A demurrer to the petition on the grounds that it did not state a cause of action, that relator had no capacity to sue and was not the proper party to bring or maintain it, was overruled. Thereupon defendants answered and went to trial before the court without a jury. No declarations of law were asked or given. The court found for the plaintiff and assessed the damages at $2350 with six per cent interest from December 5, 1915, the date of the institution of suit, aggregating $2615.75, and rendered judgment for the penalty of the bond to be satisfied by the payment of the above amount. Defendants have appealed.

By answering over after the demurrer, defendants waived any defect or informality not amounting to an entire absence of any cause of action whatever. But, of course, the questions of relator's right and capacity to sue, and whether any cause of action whatever was stated were not waived, and remained to be decided.

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When William Hubbard died, the right to settle the partnership estate vested in Lewis Hubbard, the surviving partner. Such right was his under the common law and was not dependent upon his giving bond as required by section 91, Revised Statutes 1909. Had he failed to give such bond he might have been deprived of the partnership assets by the administrator of William Hubbard's individual estate had one been appointed. [Goodson, Admx., v. Goodson, Extr., 140 Mo. 206, 215.] Our statutory provisions with reference to the giving of bond by the surviving partner do not change his common-law right nor even effect it, except in the contingency noted. Upon the dissolution of the firm by the death of William Hubbard the legal right to all the partnership assets for the purpose of winding up the firm's affairs, went to Lewis Hubbard as surviving partner. [Hargadine v. Gibbons, 45 Mo. App. 460, 467 and authorities there cited.]

It is clear that even if Lewis Hubbard had not qualified under the statute as administrator of the partnership estate, but had acted merely under his common-law authority, then, upon his death the right and duty of administering upon said partnership estate would have passed to and devolved upon his administrator, the relator herein. [Hargadine v. Gibbons, supra; Dayton v. Bartlett, 38 Ohio St. 357.] "The executor or administrator of a surviving partner, who died with partnership effects in his possession while engaged in settling the partnership business, is entitled to the possession of such effects, and is charged with the duty of completing such settlement; and he cannot be precluded from receiving compensation out of the partnership funds for his services in the performance of this duty." [1 Woerner on Administration, 286.] But defendants offered to prove that on December 12, 1913 (prior to relator's appointment as administrator of Lewis's individual estate), the probate court appointed John Ryan as Administrator *de bonis non* as his successor, and the question arises whether this will affect or

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change the right of Lewis's administrator to take charge of said partnership estate or to maintain this suit without any modification or revocation of the order appointing the administrator *de bonis non*, and without any order directing relator to proceed in the partnership estate?

In Byers v. Weeks, 105 Mo. App. 72, l. c., 76, it is said: "It seems that the statute fails to provide for the administration of a partnership estate, except, either by the surviving partner or by the administrator of the surviving partner." In that case, however, there had been no administration on the partnership estate either by the surviving partner or by the administrator of the deceased partner, and the latter had fully administered the individual estate, paid all debts thereof and had been discharged, without administering the partnership assets, having been led not to do so by the fraudulent representation of the surviving partner that the partnership had been fully settled and dissolved during the life of the deceased partner and that he had been paid his full share. It would seem that there were no debts of the partnership estate, and as the individual estate had been fully administered and all debts paid, there was no basis for the reopening of the individual estate by the appointment of an administrator *de bonis non*. In fact if there were no debts of the partnership, as must have been the case, there was no need for any administration on either estate at the time the heirs brought suit. And the remark of the court was made in upholding the right of the heirs to sue in equity to recover their part of the partnership assets under the circumstances, and not as holding that there is no authority in our statutes for the appointment of an administrator *de bonis non* of a partnership estate in a case where the surviving partner has qualified under the statute and then dies, and where circumstances may require the appointment of such a successor. The statute makes no express provision on the subject unless it is to be found in the

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language of section 99, Revised Statutes 1909, which provides that: "The administration upon partnership effects, whether by the surviving partner or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as otherwise herein provided;" etc. There is no provision forbidding the appointment of an administrator *de bonis non* of a partnership estate where the surviving partner dies after qualification and before completing the administration. And section 54, Revised Statutes 1909, governing other administrators provides for the appointment of an administrator *de bonis non* when the administrator dies, resigns, or his letters are revoked. In Pullis v. Pullis, 178 Mo. 683, the Supreme Court held that after the surviving partner had administered upon and settled a partnership estate and had died, then the heirs of a part of the partners could not maintain a direct suit to recover assets of the copartnership but that an administrator *de bonis non* of the partnership estate should be appointed and the estate reopened for the benefit of the creditors and distributees of the partnership estate. Of course, in that case, the right of the administrator of the deceased partner's individual estate to administer the partnership estate was not involved, but it is plain that the court holds that an administrator *de bonis non* of a partnership estate may be appointed when the facts warrant it. The case of State ex rel. v. Shacklett, 115 Mo. App. 715, involved the acts of several successive administrators *de bonis non* of a partnership estate. In Dayton v. Bartlett, 38 Ohio St. 357, 364, it is said that the administrator of a surviving partner, who dies with partnership assets in his possession and while he is engaged in settling the partnership business, has the duty of settling up the business of the partnership as well as that of the individual estate of the once surviving partner *unless* "he is relieved from this trust by agreement of the parties or by a competent court."

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It would seem that upon the death of Lewis Hubbard, after having qualified as administrator of the partnership estate, his administrator Dockery would, under ordinary circumstances and in the absence of anything to render it inadvisable, be entitled to take possession of the assets of the partnership estate and administer it as well as that of the individual estate. But, if for any reason the duties of the two positions are inconsistent or if it would be better to have the administration of the two estates in different hands, the probate court, it would seem, could so direct.

Now, in this case, the defendants attempted to show that the probate court had appointed an administrator *de bonis non* of the partnership estate before relator was appointed administrator of the individual estate of the once surviving partner. It nowhere appears that such appointment has been revoked, and so far as known, that appointment still stands. So far as the petition and plaintiff's evidence show, there was no order directing the relator to take charge of the partnership estate or to bring suit on the bond of the surviving partner. The latter seems to have been an act springing solely from relator's own volition. No doubt he could do this, without any such order, if entitled, as individual administrator, to take charge of the partnership estate regardless of the probate court's former order. We mention this to show that there is nothing tending to militate against the apparent situation in the probate court which has seen fit to place the two estates in different hands. Now, with matters in this shape, relator secured judgment for the full appraised value of the partnership estate against the sureties on the once surviving partner's bond, without any showing whatever as to whether said surviving partner paid any debts of the partnership estate, and without any showing upon the question whether or not the individual estate coming into relator's hands as administrator thereof has not been augmented by the conversion of the partnership estate. For instance, what has be-

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come of the notes taken for one-half thereof? Are they worthless or solvent notes? Were they paid to Lewis Hubbard in his lifetime, or were they taken by relator as a part of Lewis Hubbard's individual estate? Did Lewis pay off the debts of the partnership? He had a right to do so without having them allowed in the probate court. Under the judgment rendered herein, the sureties on the bond of the partnership administrator are required to pay over the full appraised value of the partnership estate to relator as administrator of Lewis Hubbard's individual estate when, for aught that appears, said individual administrator may already have in his hands a portion at least of the funds derived from the conversion by Lewis. Again, the sureties are compelled to pay said judgment to one upon whose right to sue there appears to be at least some question by reason of the order of the probate court appointing another as administrator *de bonis non* of said partnership estate. This of itself is sufficient to make it more than probable that relator may, by seeking to control the partnership estate, be occupying two incompatible positions, since he may be regarding partnership assets as the individual property of Lewis Hubbard's estate while calling upon the sureties in the partnership estate to make good the entire apparent loss to that estate, and allowing the sureties no credit for any of such property or for any debts that the surviving partner may have paid.

It may be urged that if Lewis Hubbard paid any of the partnership debts or if there is any likelihood of relator occupying two different and conflicting positions as above indicated, such were matters of defense to be shown by defendants. Some of them were attempted to be shown, namely, the appointment of another person to take charge of the partnership estate as administrator *de bonis non,* but the offer was excluded. With respect to the others, they were matters resting largely if not wholly within the knowledge of the relator himself. He knows better than anyone else

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whether he has among the assets of the individual estate any property derived from his decedent's conversion of the partnership estate. The case is not like one where the knowledge is equally accessible to both parties. Again, since the probate court by its order has appointed an administrator *de bonis non of* the partnership estate, it would seem that the administrator of the individual estate should, before attempting to act in reference to the partnership estate, procure the revocation of the order appointing the administrator *de bonis non.* Orderly procedure would seem to require this. Certainly the individual administrator ought not to be allowed to recover of the bondsmen of the partnership administrator without first removing all cloud upon his right to sue and also disclosing that he is not subject to the claim of conflicting duties and obligations with reference to the two estates, and liable to decide between them at the expense of the sureties on the bond of the partnership administrator. The case is somewhat peculiar, but owing to the orders of the probate court wherein the two estates seem to have been placed in different hands, and the obvious possibility of there being good reason for the same being done, we do not think that relator has shown a right to maintain the suit or to obtain the judgment he has secured. Certainly defendants have not had a fair trial. In addition to their demurrer to the petition, they demurred to plaintiff's evidence and also saved exceptions to the exclusion of the evidence herein above mentioned.

Wherefore, the judgment is reversed and the cause is remanded. All concur.

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CHARLES MONROE TANNER, Respondent, v. ENOS MARION TANNER et al., Appellants.

Kansas City Court of Appeals, April 29, 1918.

1. **PARTITION: Attorney Fees: Power of Court to Allow.** In an action in partition, the trial court is empowered to allow the attorneys bringing the suit, a reasonable fee for their services to be taxed as other costs in the case, and the fact that the plaintiff sells his interest in the property to one of the defendants before final decree is entered, does not deprive the court of such power.

2. **———: Jurisdiction of Court: Estate Unsettled.** The appointment of an administrator for an estate, after the commencement of an action to partition lands belonging to such estate does not deprive the circuit court of jurisdiction to entertain such partition suit, but final decree thereon will be postponed until the estate has been fully settled or the court satisfied that there is ample property *aliunde* to satisfy all claims.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED.

Roy W. Rucker for appellants.

John D. Taylor and *M. A. Magruder* for respondent.

TRIMBLE, J.—This controversy is over the allowance of a fee to the attorneys of plaintiff in a partition suit.

It seems that in 1914, one, John Harrison Tanner, died intestate, owning 160 acres of land in Chariton county, and leaving only three heirs, namely, Charles Monroe Tanner, the plaintiff herein, and the two defendants Enos Marion Tanner and Bertha Tanner Peterson.

No administrator was applied for or appointed upon his estate, and in 1916, Mark A. Magruder and John D. Taylor, attorneys, were employed by the plain-

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tiff, Charles Monroe Tanner, to bring suit to partition the lands of which said John Harrison Tanner died seized and possessed, it being agreed between plaintiff and said attorneys that they should have for their services a reasonable attorney's fee to be allowed by the court and taxed as costs in said cause.

Pursuant to said agreement, said attorneys brought said partition suit in due form, and thereafter the defendant, Enos Marion Tanner, applied to the probate court for letters of administration on John Harrison Tanner's estate and letters were issued thereon. Said Enos Marion Tanner then presented claims aggregating $3300 against said estate and the same were allowed in his favor.

Thereupon, said two defendants set up, in the partition suit, the allowance of said claims against said estate and the lack of any personal funds out of which to pay same and prayed that said partition suit be abated for that reason. The partition suit was tried however, and at the November term, to-wit, on December 5, 1916, judgment for partition was rendered, the court finding that the lands were not susceptible of partition in kind, finding also that claims had been allowed against said estate to the extent of $3300 and that there were not sufficient personal assets to pay the debts of said estate. It was thereupon adjudged and decreed that the land be sold for cash but that the proceeds thereof "be held by the sheriff until the administration of the said estate shall have been completed to the extent of allowing all valid claims and he shall then, upon the further order of this court, pay such sums to the administrator of the estate of John Harrison Tanner as shall be necessary to complete the administration finally and shall hold such other and further proceeds of said sale, subject to the order of distribution between the parties as shall hereafter be made by the court, and the cause is continued to the next term."

Thereafter, the defendant, Enos Marion Tanner, privately purchased the interest of the plaintiff Charles

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Monroe Tanner, and of his co-defendant Bertha Tanner Peterson in said real estate and had the same duly conveyed to him by deed, all of which was done without the knowledge of plaintiff's attorneys; and immediately after such conveyance, said Charles Monroe Tanner left the State and his whereabouts is now unknown.

At the May, 1917, term of the circuit court, the defendant, Enos Marion Tanner, sole owner of all of said land, being about to have the partition suit abated, said attorneys Magruder and Taylor filed a motion in said cause to have an attorney's fee allowed and taxed as costs, setting up all the facts and alleging that at the time Enos Marion Tanner purchased the interests of his co-heirs he was fully aware of the pendency of said partition suit, having participated therein, and was fully aware of the rights and interests of said attorneys and of the services they had rendered and of their right to have a fee allowed therefor, and that they had not been paid.

Defendant, Enos Marion Tanner, appeared to said motion and filed an answer thereto admitting that he had purchased the interests of the plaintiff and of his co-defendant and was now the sole owner of said land, but prayed the court to deny said motion.

The hearing thereof was had on June 23, 1917, and the court after listening to the evidence found the facts as hereinbefore stated; found that said attorneys faithfully represented plaintiff in all things pertaining to said suit in partition and performed all duties necessary for them to perform; that no sum for attorney fees had been paid; and that Enos Marion Tanner at the time of his purchase knew that such attorneys' fees had not been paid. The court further found that said attorneys were entitled to a reasonable attorney's fee for the services they had rendered in said cause to be taxed as costs therein, and fixed said fee at $400 and directed that it be taxed as costs in the case and made a lien on the land, describing it, and ordering special execution to issue therefor. From the action of the court

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on said motion, defendant Enos Marion Tanner has appealed.

It is agreed that the reasonable value of the farm is $12000.

The contention of appellant is that the circuit court was without jurisdiction to order partition of the land in question because it affirmatively appeared that there were debts against the estate and there was no other property out of which the same could be paid. Waiving the question (if there is any), as to whether this appeal, from the order of the court on said motion, can attack the jurisdiction of the court to adjudge partition at the time such judgment was rendered, we proceed to a consideration of the above contention. It is based upon the decision in Tuppery v. Hertung, 46 Mo. 135. But that opinion rests upon the statute in force at that time. Shorly after that decision was rendered the statute was changed. Said statute is now section 2570, Revised Statutes 1909, and reads as follows:

"Upon judgment of partition in proceedings commenced in this article, where the lands . . . sought to be divided . . . shall have descended to any of the parties in interest, and the court shall not be satisfied either that the estate from which the same has descended has been finally settled, and all claims against the same fully discharged, or that the personal property, or other real property not already partitioned, belonging to such estate, is more than sufficient to pay all claims and demands against the same, the order of distribution shall not apply to nor take effect upon any of the lands, tenements or hereditaments allotted, or the share of the proceeds of any sale adjudged to the parties whose interest shall have so descended, until such estate shall have been finally settled and all claims against the same fully discharged; and until such final settlement, the interest of all parties in such lands, tenements or hereditaments, or in the proceeds of sale in cases where sale has been ordered, shall remain and be subject to the claims against the same."

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In Chrisman v. Divinia, 141 Mo. 122, l. c. 130, the Supreme Court, in passing upon the same contention said:

"But section 7143, Revised Statutes 1889, now 2570, Revised Statutes 1909, clearly sanctions the partition of land before final settlement of the estate to whose demands the land may yet be subject. Such a speedy partition is obtainable *only upon the conditions named in the* statutes, but it cannot justly be said to be forbidden or beyond the jurisdiction of the court." (Italic ours.)

In the case at bar, the court complied with the conditions specified in the statute by providing that the proceeds be held until the administration would determine the amount needed for debts and a sufficient sum for administration purposes be turned over to the administrator. No compliance with this statutory condition was had in the case of Mills v. Mills, 141 Mo. 195, and this is what is meant when the court in that case at page 199 said, "no partition could be properly made *without providing for the discharge of the debts* chargeable against her estate." (Italics ours.) It is true, judgment denying partition was affirmed in that case but that was because of several reasons: (1) Because plaintiffs, in their petition, had demanded partition as heirs of a person not the owner of the legal title; and (2) because, although the parties were also heirs of the person who did own the title, no request for partition on that basis had been asked, nor was any provision made, or sought to be made, whereby the debts of that person would be taken care of. Nothing more than this is meant by the remark in Eoff v. Thompson, 66 Mo. l. c. 226, where the court speaks of "that provision of the partition act, prohibiting partition of land from being *finally consummated* until the estate has been fully settled or the court satisfied that there is ample property *aliunde to* satisfy all claims." (First italics ours).

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The ruling in Chrisman v. Divinia, supra, is approved and upheld in Barnard v. Keithley, 230 Mo. 209, l. c. 228.

We are, therefore, of the opinion that the allowance of the attorney's fee cannot be defeated on the ground that the court, at the time the judgment of partition was entered, had no jurisdiction to render the judgment that was rendered, complying, as it did, with the condition provided for and required in said section 2570.

Did the court otherwise have power to allow an attorney's fee in a partition proceeding in which the attorneys had done everything required of them in which a *final* decree was prevented only by the action of the defendant in buying up the interests of all the other owners of the land, with full knowledge of the attorney's services and rights? Section 2609, Revised Statutes 1909, says, "The judge of the court in which *any suit* under this article *may be brought* shall allow a reasonable fee to the attorney or attorneys *bringing the suit* . . . which fee shall be taxed and paid as other costs," etc. The power to tax a fee is not conditioned here upon the rendition of a final decree in partition. Of course, if the failure to obtain a final decree arose through any fault or dereliction of the attorneys or because it could never have been secured, then doubtless no fee would be allowable. But here the defendant voluntarily and with full knowledge of the attorneys' rights, *by his own act,* obviated the necessity of a final decree, or rather he, with full knowledge, made himself master of the situation where he could compel the dismissal of the suit or a modification of the decree whereby a sale would be obviated and the whole title declared vested in him subject to the payment of his ancestor's debts. It cannot be said that there may never have been anything to divide, since the land is worth $12000 and the allowed debts only $3300, and defendant has *purchased* the interest of the other heirs, which he doubtless would never have done had they owned nothing to sell. Neither can it be said that defendant

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has obtained no benefit from the bringing of the partition suit, since it was not until after that was done that he secured the other interests. However, the attorneys' right to their fee does not depend upon whether the bringing of that suit was of benefit to defendant. It depends upon their rights under the law by reason of the services rendered under their contract and the power of the court to allow them their fee in a case where those services would unquestionably have resulted in a final decree had not the defendant, with full knowledge of their rights, and without fault on their part, put himself in a position to stop all further proceedings. The court had jurisdiction to entertain the partition suit, whereby costs would be, and were, incurred as the case proceeded; and if anyone else had, with knowledge, purchased the interest of anyone of the heirs, the purchaser would have taken it subject to the burden of that heir's proportion of said costs. And the fact that the purchaser of the other two shares happens to be the remaining heir can make no difference. All three interests were, at the time of defendant's purchase, subject equally to the costs *incurred,* though not formally taxed, at that time. Hence there is no reason for confining the costs to the one-third share derived from plaintiff, since the defendant, Enos Marion Tanner, owns all the interests. He has his own share, burdened with its proportion of the costs, and obtained the other two burdened with theirs. So far as the record discloses, there is nothing to show but that he, in paying for the other shares, made due allowance for the costs for which they were liable. But whether he did or not, he took them with that burden on them, and there is no injustice in taxing them as costs against all the land. The fee, when taxed as costs, has the same lien upon the land, and no more, than the other partition costs have, and this is all that is effected by the orders of the court making it a "special lien" against the land and ordering "special" execution to issue therefor.

The judgment is affirmed. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1917.

B. F. BUSH, Receiver, Respondent, v. KEYSTONE DRILLER COMPANY, Appellant.

Springfield Court of Appeals, December 20, 1917.

CARRIERS: Interstate Shipment: Action for Freight: Estoppel. Estoppel is not available as defense to action for balance of freight for interstate shipment where, through mistake in computation, the full lawful rate, which could not be varied, was not collected, though the consignor, who also was consignee, will suffer loss through insolvency, arising since the original payment, of the person to whom the goods while in transit were sold, with indorsement and delivery of the bill of lading.

Appeal from Jasper Circuit Court.—*Hon. B. A. Pearson,* Judge.

AFFIRMED.

J. D. Harris for appellant.

Jas. F. Green and *A. E. Spencer* for respondent.

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BRADLEY, J.—Plaintiff, as receiver for the St. Louis, Iron Mountain & Southern Railway Company, brought suit against defendant to recover a balance claimed for freight for an interstate shipment, and a jury was waived and the cause tried before the court. Judgment went for the plaintiff, and defendant duly perfected its appeal to this court. We set out the pleadings in part which is necessary in view of the stipulations. Plaintiff demurred to all that part of defendant's answer except the first paragraph, and the court sustained this demurrer.

No evidence was taken, but it was stipulated that plaintiff had offered evidence tending to prove all the allegations of the petition, and that defendant had offered evidence tending to prove all the allegations in the second paragraph of its answer. The plaintiff objected to the offering of defendant, and the court sustained the objection.

The part of plaintiff's petition containing the allegations of fact is as follows:

"That on the dates hereinafter mentioned, the Pennsylvania Railroad Company was engaged in operating a line of railroad extending, amongst other points, from Beaver Falls, Pennsylvania, to Chicago, Illinois, and the Chicago & Alton Railroad was engaged in operating a line of railroad extending, amongst other points, from Chicago, Illinois, to East St. Louis, Illinois, and to St. Louis, Missouri, and each of said last named companies were engaged as common carriers in transporting freight for hire over their respective lines.

That heretofore, to-wit, on October 2, 1913, said defendant Keystone Driller Company loaded in car initial P. C. C. & St. L. and No. 939534, the following merchandise, to-wit: (Here follows items of shipment), and delivered same to said Pennsylvania Railroad Company at Beaver Falls, Pennsylvania, for transportation to Inola, Oklahoma, said shipment being routed by said shipper over the Pennsylvania Railroad Company's lines to Chicago, Illinois, over the Chicago

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& Alton Railroad lines from Chicago, Illinois, to St. Louis, and over the lines of the St. Louis, Iron Mountain & Southern Railway Company from St. Louis, to Inola, Oklahoma, said shipment being consigned to the order of said defendant Keystone Driller Company at said destination. That said shipment was received by said Pennsylvania Railroad Company, which agreed to make said shipment, and issued its written and printed bill of lading therefor, duly signed by said receiving carrier and by said defendant, in and by which bill of lading and contract for shipment it was agreed, amongst other things, that the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. That said defendant was both the owner and the consignee of said goods. That the weight of said goods shipped as aforesaid, was 47,100 pounds. That said goods were transported over said lines of railway in accordance with said contract, and were delivered at Inola, Oklahoma, to the said consignee or its order, and that at said time there was paid on account of the freight charges for said shipment the sum of $183.60. That said shipment was interstate in character, and that the several carriers above mentioned had then on file with the Interstate Commerce Commission and approved by it and duly published according to law, tariffs and rates covering such shipments between said points, and which constitute the only proper and lawful rate and charge therefor, as follows: The rate on said shipment from Beaver Falls, Pennsylvania, to St. Louis, Missouri, twenty-two and one-half (22 1-2) cents per 100 lbs., and from St. Louis to Inola, Oklahoma, fifty-four (54) cents per 100 lbs., making total rate of seventy-six and one-half (76 1-2) cents per 100 lbs. from Beaver Falls, Pennsylvania, to Inola, Oklahoma, and making the total lawful charge on said shipment, weighing 47,100 pounds as above stated, $360.32. That said St. Louis, Iron Mountain & Southern Railway Company was the last and delivering carrier of said goods, and is required by law and the

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order of the interstate Commerce Commission to bring this action to recover the unpaid balance of freight charges. That there remains due and owing to this plaintiff, as receiver of said St. Louis, Iron Mountain & Southern Railway Company, on account of said freight charges on said shipment, after giving credit for said payment of $183.60 a balance of $176.72. That on October 26th, 1915, plaintiff demanded of defendant payment of said amount, which was refused, and the defendant has failed and refused to pay same or any part thereof."

The answer is as follows:

"Now comes the defendant and for its answer to the plaintiff's petition herein, admits that the plaintiff is the receiver of the St. Louis Iron Mountain & Southern Railway Company, as alleged in the plaintiff's petition; admits that on October 2, 1913, defendant shipped the merchandise set out in the plaintiff's petition by freight in the car therein described, from Beaver Falls, Pennsylvania, to Inola, Oklahoma; but denies each and every other allegation therein contained.

Defendant further answering to said petition says that the initial carrier of said shipment was the Pennsylvania Railway Company, mentioned in the plaintiff's petition, which agreed to make said shipment from said Beaver Falls, Pennsylvania, to Inola, Oklahoma, aforesaid and issued to the defendant its printed and written bill of lading therefor, duly signed and sealed by said receiving carrier; that thereafter while said shipment was in the hands of said carriers, defendant, for value received, duly assigned said bill of lading to R. A. Stewart and J. M. McNames, and that by said assignment said Stewart and McNames became the owners of said property and were such owners when said shipment reached its destination at Inola, Oklahoma, in the hands of the plaintiff; that thereafter said Stewart and McNames presented said bill of lading to plaintiff's agent at said point and offered to pay all freight charges upon said shipment at the regular

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terms of rate, and that as to this defendant, it then and there became the duty of the plaintiff through its agent to collect from said Stewart and McNames all tariffs, freight charges and costs held by the plaintiff or any said carriers thereon; that the plaintiff's agent at Inola, Oklahoma, at the time and place of collecting said freight charges had then and there before him the way-bill of said car, showing the charges and correct weight of said merchandise, and if the plaintiff failed to collect the sufficient amount of freight charges thereon, it was through the direct result of its own carelessness and negligence through and by its said agent in failing to look at said way-bill and to figure said freight charges and to demand the same of Stewart and McNames, owners of said property. Defendant further avers that said Stewart and McNames were solvent at the time of said collection and at the time said property was turned over to them by said Railway Company and were so solvent for a long time thereafter; but that the plaintiff failed to demand said balance, if any of said freight charges from said parties or either of them, and failed to give this defendant any notice that there were any unpaid freight charges on said shipment, and that no notice whatever of any such claim on the part of the plaintiff was made to this defendant until the 26th day of October, 1915; that in the meantime said Stewart and McNames had become insolvent and that they have ever since been in an insolvent condition and are now wholly insolvent; and that the plaintiff by its negligence and conduct aforesaid, has rendered it impossible for the defendant to reimburse itself from said Stewart and McNames, if it should pay any part of said freight for them; that this defendant was not the owner of said property at the time same was delivered by said plaintiff carrier to said Stewart and McNames and was not liable for any of said freight charges, said Stewart and McNames being liable for all such charges as such owners; and that even if defendant had been liable therefor as consignor and original consignee of said shipment as

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charged in plaintiff's petition, plaintiff has by its conduct rendered it impossible for the defendant to collect any part of said charges from said Stewart and McNames on account of their insolvency as aforesaid, which defendant could have done had it had any notice of any such claim, and thereby relieved itself from any such imputed demand; and that by reason of the premises the plaintiff is now estopped from asserting such demand sued on in its petition against the defendant."

Was the court in error in sustaining the demurrer to that part of defendant's answer pleading estoppel, and in sustaining the objection to defendant's offer to make proof of the facts set up in its plea of estoppel? The correct answer to this question settles the controversy so far as the law side of the argument is concerned.

The shipper and consignee in the instant case is one and the same. The defendant shipper requested the plaintiff in effect to ship to itself from Beaver Falls, Pennsylvania to Inola, Oklahoma certain freight. At that time the defendant was the owner and shipper and was primarily for the lawful charges of transportation. [Yazoo & M. V. R. Co. v. Picher Lead Co., 190 S. W. (Mo. App.) 387; Wells Fargo & Co. v. Cuneo, 241 Fed. 727.] While in transit the defendant assigned the shipment, and endorsed and delivered the bill of lading, and the title to the shipment passed to another. The assignee of the consignee in a bill of lading is liable to the carrier for transportation charges where the assignment is made while the goods are in transit, or in the possession of the carrier (St. Louis Southwestern Ry. Co. v. Brown Grain Co., 166 S. W. (Tex.) l. c. 42; 4 Elliott on Railroads, sec. 1559; 2 Hutchinson on Carriers, secs. 807-808), and where the carrier delivers the goods to the assignee of the consignee without collecting the freight charges, the consignee is usually released. But it is not necessary to determine whether the defendant as consignee is liable, but has the defendant as consignor or shipper brought itself within

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any rule of law that would release it from its original liability? We do not think so. The fact that the defendant as consignee endorsed the bill of lading to another, and that the carrier collected a part of the charges from the assignee, would not of itself relieve the shipper of his original liability.

The only question for our determination is: Will the defense of estoppel lie?

N. Y. N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. Rep. 272, defines the purpose of the act known as the Interstate Commerce Act, from which the Interstate Commerce Commission derives its power to regulate interstate rates, and it is there said: (l. c. 389)

"The all-embracing prohibition against either directly or indirectly charging less than the published rate shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

The proposition that the shipper and the carrier on an interstate shipment cannot contract for a rate different to that prescribed by the schedule filed with the Interstate Commerce Commission is not controverted. This question was once mooted, but no longer. [Texas & Pac. Ry. Co. v. Mugg & Dryden, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern Railway Company v. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. Rep. 362; Dunne & Grace v. Railroad Co., 166 Mo. App. 372, 148 S. W. 997.]

The shipper cannot plead a counterclaim for damages to the goods shipped, no matter how meritorious his claim may be. I. C. C. R. R. Co. v. Hoopes, et al., 233 Fed. 135, was an action for unpaid freight charges on an interstate shipment. Defendants filed a counterclaim for damages to the goods shipped. A demurrer

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to this counterclaim was sustained, and the court in deciding the case quoted from C. & N. W. Ry Co. v. Stein Co., 233 Fed. 716, thus:

"If a shipper may be permitted to set-off, in an action for freight earned by a carrier, claims for damages which the shipper alleges he has sustained, the court must prevent the usual right to make compromise of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defense, in order to prevent the granting and receiving of rebates by insidious agreement between the parties with reference to the disposition of the suit. The public policy evinced by the acts of Congress relating to interstate commerce requires the denial of the right to set-off in such cases, leaving the shippers an independent action to enforce any rights that belong to them."

If the plaintiff and the defendant could not contract for a different rate than that prescribed by the schedule on file with the Interstate Commerce Commission, and defendant could not plead a just counterclaim for damages to the goods shipped, then can the plaintiff accomplish by its silence, or its act or failure to act, that which it could not do by contract? To illustrate:

Suppose defendant at Beaver Falls, Pennsylvania had entered into an agreement with plaintiff or with the initial carrier, both in good faith, and ignorant of the true rate, that the car of merchandise would be shipped to Inola, Oklahoma for an amount which afterwards turned out to be $176.72 less than the rate prescribed by the schedule then on file with the Interstate Commerce Commission; and that in pursuance of this agreement the initial carrier and connecting carriers had complied therewith, and shipped the car of merchandise from Beaver Falls, Pennsylvania to Inola, Oklahoma and that while this car was in transit defendant sold the merchandise and duly assigned the bill of lading to Stewart and McNames; and that on the arrival of this car of merchandise at Inola, Oklahoma, the carrier delivered the same to defendant's assignee, and still in

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accordance with the original contract collected $176.72 less than the total rate provided by law; that thereafter there was no mention of any claim against defendant for further charges for two years, and no demand made upon the assignee, and in the meantime said assignee became insolvent; and concede that had defendant known the required rate, it would have collected said amount from the assignee at the time it sold the car of merchandise or before they became insolvent.

If these conditions had existed instead of the facts as they are in the instant case could plaintiff recover? The authorities cited, supra, answer in the negative. Then if plaintiff and defendant could not by contract relieve plaintiff of the obligation of charging, and the defendant of the obligation of paying, the lawful rate, can the same result be accomplished by the act, or the failure to act, of either? We think not. It is the plain duty of this court to follow the last ruling of the Supreme Court of the United States upon a question of the character here presented which is the construction of a federal statute; and in doing so we are following the directions of our own Supreme Court. [Haseltine v. Central National Bank, 155 Mo. 66, 56 S. W. 895.]

Damage or loss to the shipper, and good faith, are not elements to be considered in cases of this character. [Texas & Pacific Ry. Co. v. Mugg & Dryden, supra; B. & O. S. W. Ry. Co. v. New Albany B. & B. Co., 94 N. E. (Ind.) 906.]

Yazoo & Mississippi Valley Railroad Co. v. Picher Lead Co., 190 S. W. (Mo. App.) 387, cited by appellant as authority for the proposition that the defense of estoppel is available in the instant case, is not in point. There the defendant at the request of a commission company of St. Louis that had bought from it a car of lead, shipped the same from Joplin, Missouri, to one Mishler at Clarksdale, Mississippi. The shipment was over the Frisco Railroad from Joplin to Memphis and from there to its destination over the Yazoo & Mississippi Valley Railroad. The shipment was

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delivered to the consignee, but, by mistake, plaintiff collected only the regular established transportation charges from Joplin to Memphis. The action was brought to recover the balance. The case was tried on an agreed state of facts and judgment below went for the defendant. On appeal the case was reversed with directions to enter judgment for plaintiff.

ROBERTSON, P. J. in the course of the opinion in the Yazoo and Mississippi Valley Railroad Company v. Picher Lead Company case used this language:

"There is no allegation or statement of facts that tend to prove waiver or estoppel, and no such defenses are urged here."

But this is far from holding that the defense of waiver or estoppel is available in cases of this character, or the character there under consideration. The expression is no more than *obiter dictum,* as there was no question of estoppel or waiver in the pleadings or in the agreed statement of facts in that case. Appellant has cited no authority holding that estoppel as a defense could be pleaded against a demand for the charges fixed by law for an interstate shipment; nor has any authority on an analogous principle been cited; nor have we found any which would justify us in so holding. The nearest approach to an authority holding in effect that estoppel will lie in cases of the character here under consideration is Yazoo & M. V. R. R. Co. v. Zemurray, 238 Fed. 789. But in that case the court expressly stated that no feature of any interstate commerce law was involved and the case was controlled by the Statute of Limitations. To hold that the carrier can do indirectly that which it cannot do directly is wholly inconsistent with the letter and the spirit of that part of the Interstate Commerce Act, and its various amendments, regulating interstate rates of common carriers. In L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. Rep. 494, plaintiff sued for the difference in the price of some passenger tickets from Nashville, Tennessee, to Salt Lake City, as fixed by the Interstate

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Commerce Commission and the price sold at by plaintiff. Judgment went for defendant in the State courts of Tennessee, and the case was taken to the Supreme Court of United States by writ of error. In reversing the case Mr. Justice HUGHES said:

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Central of Georgia Ry. Co. v. Birmingham Sand and Brick Company 64 Southern (Ala.) 202, is directly to the point. There an error was made in estimating freight on interstate shipments, and suit brought for the difference between the lawful rate, and the amount collected. The defense was facts tending to establish estoppel; as in the instant case. The court in that case held that estoppel would not lie, and in disposing of the matter used this language which we think clearly reflects the spirit of the act of Congress regulating interstate rates: "The necessary effect of all these decisions, construing and applying the Interstate Commerce Act, when considered together, is, in our opinion, that the carrier cannot, by any act, estop itself from exacting the lawful freight rate. If the carrier could so estop itself, then it would lie within the carrier's power, by purposely putting itself in a position where it could not exact the lawful rate of a shipper it desired to favor, to render nugatory one of the main designs of the act, the prevention of discrimination between shippers; and for the law to countenance the doctrine of estoppel in cases like this is for the law to

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say through the courts that the carrier is estopped from doing what the statute mentioned plainly requires that it must do—collect the lawful rate in all cases, and nothing greater and nothing less, by any means or device whatsoever. We cannot escape the conclusion that Congress impliedly intended by the act mentioned to deny to consignors and consignees the defense of estoppel when sued by the carrier for the lawful rate, since such a defense is entirely inconsistent with and destructive of the purposes of the act."

It follows from the above and foregoing that the defense of estoppel in our judgment is not available in the instant case, and that the trial court was correct in sustaining plaintiff's demurrer to that portion of the answer pleading estoppel, and in sustaining the objection of plaintiff's offering to prove the facts set up in that part of its answer pleading estoppel. It is just as reasonable that the letter and spirit of the interstate commerce act regulating interstate rates could be sidestepped and avoided by pleading estoppel as in counterclaim or set-off, and in principle we can see no difference in the ultimate effect.. The judgment of the trial court is therefore affirmed. *Sturgis, P. J.*, and *Farrington, J.*, concur.

FREDERICK LOWRY, Respondent v. H. M. SMITH, Appellant.

Springfield Court of Appeals, November 13, 1917.

1. **APPEAL AND ERROR. Review: Order Granting New Trial.** The record not showing the theory on which new trial was granted, the order should be sustained on appeal, if it can be on consideration of the whole record.

2. **MUNICIPAL CORPORATIONS: Pedestrian Crossing Street: Duty to Look.** It is the duty of a pedestrian, before starting to cross a street in the thick business part of a street, especially at a point not a regular crossing, to look.

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3. **APPEAL AND ERROR: Harmless Error: Instructions.** The word "listen," in an instruction that it is the duty of one about to cross a street, where vehicles may be expected, to look and listen, and if plaintiff stepped on the street without looking, and had he looked he could have seen defendant's auto in time to avoid being struck, he cannot recover, while superfluous, is harmless; the instruction clearly showing it is predicated on the duty to look.

4. ———: **Review: Granting New Trial: Ground not in Motion.** The granting of a new trial cannot be sustained on any error in refusing an instruction, this not having been complained of in the motion for new trial.

5. ———: ———: **Order Granting New Trial.** On an appeal allowed by Revised Statutes 1909, sec. 2038, from an order granting a new trial, while the exercise of a pure discretion, as on the ground of the weight of the evidence, or that perjury has been committed, will not be interfered with, yet where the ground is purely a judicial one, or an error of law as in the giving or refusing instructions, the matter will be reviewed.

Appeal from Circuit Court of Greene County.—*Hon. Arch A. Johnson,* Judge.

REVERSED AND REMANDED (*with directions.*)

W. H. Horine and *Warren L. White* for appellant.

F. T. Stockard and *Hamilin & Hamlin* for respondent.

BRADLEY, J.—This is an action for damages for injuries received by the plaintiff about two o'clock in the afternoon on the 29th day of October, 1915, by being struck by appellant's automobile. The petition is not set out in full in the abstract, but the only acts of negligence charged are that defendant came along on South Campbell street in the city of Springfield at a high, reckless and dangerous rate of speed with his large and powerful automobile, and without warning, carelessly and negligently ran said automobile against, upon and over plaintiff. The material facts disclosed in the record are: That the plaintiff was walking north on the east side of South Campbell street, and

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was about ten or twelve feet north of what is called Traffic alley which approaches South Campbell street from the east. South Campbell street at the place where plaintiff was injured is one of the main business thoroughfares of the city of Springfield, and Traffic alley is also used as a public street and upon it there is considerable traffic. When plaintiff had crossed Traffic alley and was about ten or twelve feet north of where it connects with South Campbell street he decided that he would go across the street to speak to or to see a person on the west side. He testified that he looked up and down South Campbell street and saw no approaching vehicle except a water wagon; that he waited for the water wagon to pass and then stepped off the sidewalk from the east side of South Campbell street and started across the street, and had taken only two or three steps into the street when he was struck. The defendant driving his car on the right hand side or east side of the street was approaching from the south, having come into South Campbell street some seven hundred feet south of where plaintiff was injured. South Campbell street at the place where plaintiff was injured is paved with concrete, and had been dusty, but had been just recently sprinkled which made it slippery, "soapy" as the defendant expressed it. The street is a little down grade to the north where plaintiff was injured. The speed of defendant's automobile was placed all the way from six to thirty miles an hour. Defendant did not sound his horn because he did not have time, after he saw plaintiff's peril, but "hollered" at plaintiff, and veered his car to the west, and it skidded around, and the right hind fender struck plaintiff and knocked him down in the street, and when the car stopped, it was at right angles with the street about ten or twelve feet north of Traffic alley, with the back end and thereof near the curb on the east side of South Campbell street. Other facts material to the issues will be mentioned in the course of this opinion.

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The answer was a general denial and a plea of contributory negligence. The issues were submitted to a jury under correct instructions, and a verdict returned for the defendant. Plaintiff in due time filed his motion for a new trial, which motion was by the court sustained, and a new trial granted; and from this action of the trial court in granting plaintiff a new trial defendant has appealed to this court. The record does not disclose upon what theory the learned trial court sustained the motion for a new trial, and this being the situation its action therein should be sustained if it can be upon consideration of the whole record.

Appellant states in his brief and so stated in oral argument, and this is not controverted, that the trial court sustained plaintiff's motion for a new trial solely on the ground that error, in the opinion of the trial court, had been committed in giving instruction number one requested by defendant; that this instruction was in conflict with the rule announced in Bongner v. Ziegenhein, in 165 Mo. App. 328, 147 S. W. 182. With this conclusion of the trial court we do not agree.

Instruction number one given at the request of the defendant is as follows:

1. You are instructed that it is the duty of any person about to step upon or across a street where vehicles may be expected to be passing to look and listen for the approach of such vehicles, and if you believe from the evidence that the plaintiff stepped upon the street without looking for the approach of vehicles, and if you further find that if plaintiff had looked, and could have seen defendant's car approaching in time to avoid being struck, you will find the issues for the defendant, even though you may believe from the evidence that defendant was guilty of negligence in failing to exercise the highest degree of care a highly careful and prudent person would have used under like circumstances at said time and place.

The point is that this instruction required more of the plaintiff than the law justified under the circum-

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stances. Appellant concedes that the rule of stop, look and listen as applied to one approaching a railroad or a street car line does not apply to one crossing a public street, but insists that the facts disclosed in this record amply justified instruction number one. The plaintiff contends that as to whether he should have looked and listened is a question of fact for the jury.

In Bongner v. Ziegenhein, supra, the facts briefly are; Bongner was a passenger on a south bound street car on Grand avenue destined to Magnolia avenue in St. Louis. As the street car halted at the usual stopping place on Grand avenue at its intersection with Magnolia avenue, Bongner stepped off its forward platform and took about three steps towards the pavement when he was run upon and injured by an automobile driven by Ziegenhein. Ziegenhein had been driving south following the street car several blocks before he reached Magnolia avenue, and at the crossing of both Shennandoah avenue and Sidney street, he had stopped his automobile while passengers alighted from the street car, but did not do so at Magnolia avenue. When the street car stopped at the usual stopping place at Grand and Magnolia avenues, Bongner stepped off at the forward end, but just before he stepped off he looked north and south on Grand avenue and observed no conveyance, and stepped off and walked directly west towards the sidewalk without looking again, and while walking to the sidewalk was struck by Ziegenhein's automobile. Ziegenhein gave no warning of his approach by sounding the horn on his automobile. The proposition was strongly urged in the Ziegenhein case that it was the duty of a person under the circumstances obtaining there to look before walking out upon the street after alighting from a street car, and in this connection the court said:

There may be cases where the use of a public street by heavy and swift conveyances presents a condition of constant turmoil so threatening to the safety of pedestrians that a court would be justified in declaring one

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negligent in attempting to cross without looking and listening.

As to the character of South Campbell street with reference to traffic, plaintiff testified:

Q. Now state to what extent by pedestrians, footmen, Campbell street is used there about the intersection of Campbell street and Traffic alley by persons crossing South Campbell street? A. It is a crossing place. I see other people crossing there. I crossed or tried to. It is used a great deal and there are business buildings all along there, hardware store on the corner, business houses on the other side. It is one of the thick business parts of the city.

Q. Before stepping off the sidewalk to start across South Campbell street, state what you did, if anything, in the way of looking out. A. I looked south and looked north. I didn't see anything but the water wagon on the street except some rigs standing along the curbing, I suppose automobiles and delivery wagons.

Q. You looked up and down the street both ways? A. Yes.

Q. Saw no automobiles? A. None running——I put out my left hand and touched the telephone pole and waited until the water wagon passed, it was going north. It was coming in the same direction Mr. Smith was going when the automobile struck me. It was going north sprinkling the street and I waited for it to get by. And when it got by, I looked (south) up the street.

From the plaintiff's own evidence South Campbell street where he undertook to cross is one of the thick business parts of the city, and we cannot from this record say that it is such a street as to justify plaintiff in undertaking to cross without looking. We do not think that the word "listen" in the instruction complained of is of much importance, and in this case superfluous, but harmless, as a reading of the entire instruction clearly reveals that it is predicated upon the proposition that it was plaintiff's duty to look. Plaintiff testified that he did look, thus recognizing that to look

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was his duty; but as to whether he looked or not was a question for the jury, and the jury determined that question against him. The plaintiff testified that he could see as far as 200 yards south on South Campbell street and that if there had been an automobile there he would have seen it; he testified also that his hearing was good and that his eyesight was good.

Ginter v. O'Donoghue, 179 S. W. (Mo. App.) 732, is a case very similar to the case at bar. There the plaintiff sued for damages alleging that the defendant, while operating an automobile on a public street, much used for travel, in the city of St. Joseph, negligently struck and injured her. The charges of negligence upon which the case was submitted were that the defendant ran his car in a careless, negligent and reckless manner, negligently ran his car against plaintiff without giving any alarm or signal of his approach. The jury found for the defendant and the trial court sustained a motion for a new trial, and defendant appealed. No grounds were specified in the order granting a new trial, but it was practically conceded that the court erred in instructing the jury on behalf of defendant to the effect that the law only required of him to exercise reasonable care. The action of the trial court was sustained on appeal because of the manifest error. We refer however to the O'Donoghue case rather at length because the facts are very similar to the facts of the instant case, and we also think it settles conclusively the question of plaintiff's duty to look.

Plaintiff in Ginter v. O' Donoghue, supra, was a girl not quite sixteen at the time of the injury which occured about nine o'clock at night on one of the much travelled thoroughfares of St. Joseph. The street was well lighted. Plaintiff leading her little five-year old sister by the hand came out of a store and went to the curb desiring to go diagonally across the street. When she reached the curb she looked both east and west and not seeing any automobile or vehicle coming, stepped out into the street. She had gone fifteen or twenty steps and was in the center of the street when defendant

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in his automobile approached her from the rear and struck her. The court held that whether plaintiff looked or did not look, or if she looked, she could have seen, were questions of facts for the jury. These identical questions were submitted to the jury in the instant case. In the course of the opinion in the O'Donoghue case, l. c. 734, the court said:

"It cannot be said therefore that the evidence conclusively shows that plaintiff did not look before she started, or if she looked was clearly negligent in failing to see the car. If plaintiff exercised the care of an ordinarily prudent person by looking before she started across, then she is entitled to have a jury pass upon her case."

In this case the court clearly says that it was the duty of the plaintiff to look before she started across the street. The facts as to the condition of the street are very similar to the case at bar.

A pedestrian has the right to cross a thoroughfare at any point yet in crossing elsewhere than at the place set aside for the crossing of pedestrians he must exercise additional vigilence, though he is not required to keep a lookout to the rear, nor if he has started across a clear street to continue to lookout for approaching vehicles. In crossing a street he is not held to the same degree of care in stopping, looking and listening for approaching automobiles as is imposed upon a traveler at a railroad crossing in looking out for approaching trains, but is required to exercise reasonable care. It is the duty of a pedestrian traveling in a public street in a city, to exercise for his personal safety the faculties with which he is endowed by nature for his protection, and a person is not entitled to walk the streets with closed eyes and inattentive mind. [2 R. C. L., 1186; Minor v. Stevens, 118 Pac. (Wash.) 313; 42 L. R. A. (N. S.) 1178; Berry on Automobiles, secs. 214-215.]

It is evidently the duty of a person crossing a public street in a city to make reasonable use of all his senses in order to observe an impending danger, and if he

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fails to do so and is injured by reason of such failure he is guilty of such negligence as would prevent any recovery for the injury sustained; but as to whether the pedestrian made reasonable use of his senses are questions for the jury, and not for the court, and in the instant case the jury determined that question against the plaintiff. Such reasonable use of the senses, however, means such use as an ordinary prudent and careful person would have used under like circumstances. [Minor v. Stevens, supra.]

To look for vehicles on approaching a crossing in a busy street is the natural thing for the pedestrian to do, and common observation and experience strongly and convincingly argues that the ordinary average person will not cross a busy street in a city without looking to see whether or not there may be approaching vehicles. Then is it not a duty to look? This is clearly the observation in Ginter v. O' Donoghue, supra, and is not in conflict with any rule announced in Bongner v. Ziegenhein, supra; rather is it in full accord with the doctrine announced in the Ziegenhein case, because in that case the court observes that there may be cases where it would be the duty of a person about to cross a street to look for approaching vehicles. All of the cases upon which plaintiff relies to relieve him as a matter of law from looking are where the injured person was seeking to recover damages for injuries received from automobiles while alighting from street cars, or leaving the curb to board street cars, or facts wholly dissimilar to the facts of the instant case.

Respondent in his brief filed in this court urges that the action of the trial court in granting him a new trial might be sustained because of the action of the trial court in permitting counsel for defendant to interrogate one of plaintiff's witnesses in an improper manner, but a careful examination of the record discloses that the trial court sustained all of the objections that were made by plaintiff with reference to this subject and therefore there was no error in this respect. Plaintiff raises the point in his brief in this court that

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the trial court erred in refusing to give instruction "A" requested by him; but from an inspection of plaintiff's motion for a new trial it appears that no complaint is made therein as to the action of the trial court in refusing this instruction, and therefore that question is not before us.

Plaintiff insists that the trial court in its discretion may grant one new trial, and that its action will not be disturbed unless that discretion has been abused, and cites us to Tiede v. Fuhr, 195 S. W. (Mo.) 1008; and Cohn v. Railway, 182 Mo. 577, 81 S. W. 846; but an examination of these discloses that in the Fuhr case the trial court had sustained a demurrer to the evidence and compelled plaintiff to take an involuntary nonsuit, and also in the course of the trial the court had refused the right of the plaintiff to rigidly examine one of her witnesses who had changed fronts, it appears, since a former trial of the same cause, and this case is not authority on the question here under consideration. In the Cohn case it appears that after the introduction of plaintiff's evidence the defendant interposed a demurrer, and on a suggestion by the court that this demurrer would be sustained, plaintiff took a nonsuit, which on motion was set aside.

The statute, section 2038, Revised Statutes 1909, specifically provides that the party aggrieved may take an appeal "from any order granting a new trial." The right of an appeal from any order granting new trial would amount to nothing if the action of the trial court was not subject to review. [Ordelheide v. Berger Land Co., 208 Mo. l. c. 244, 106 S. W. 620.]

The general rule seems to be that an appellate court will not interfere with the action of the trial court in granting a new trial where it exercises a pure discretion, as for example on the grounds of the weight of the evidence, or that perjury has been committed, but where the ground is purely a judicial one, or an error of law as in the giving or refusing instructions as in the instant case an appellate court will review such matters. [Rigby v. St. Louis Transit Co., 153 Mo.

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App. 330, 133 S. W. 110; Grain Co. v. Railroad, 177 Mo. App. 194, 164 S. W. 182: Ginter v. O'Donoghue. supra; Graney v. Railway, 157 Mo. 666, 57 S. W. 276; Haven v. Railway, 155 Mo. 216; 55 S. W. 1035.]

We have carefully examined the record and the view that we take of the law with reference to plaintiff's duty in the case at bar to look before he undertook to cross the street where he was injured, and as that question was submitted to the jury in an appropriate instruction in our opinion, except as to the word "listen" contained therein, which was harmless, we hold that the trial court was in error in granting plaintiff a new trial. This cause is therefore reversed and remanded with directions for the trial court to enter up judgment for the defendant on the verdict.

Sturgis, P. J., and *Farrington, J.*, concur.

MECHANICS' AMERICAN NATIONAL BANK, Appellant, v. M. HELMBACHER, Respondent.

Springfield Court of Appeals, February 6, 1918.

1. **NEGOTIABLE NOTE.** The presumption is in favor of the integrity of a negotiable promissory note; but if the note on its face appears to be in different handwriting, written at different times and in different ink, this destroys the presumption of integrity.

2. **HOLDER IN DUE COURSE.** By the Negotiable Instruments Act the holder in due course is one who takes such instrument complete and regular on its face, before due, in good faith, for value and without notice, at the time it was negotiated, of any infirmity in the instrument, or defect in the title of the person negotiating, it and notice of such infirmity, or defect, requires actual knowledge of such facts as will make the act of taking the instrument amount to bad faith. An endorsee cannot shut his eyes to things apparent on the face of the instrument and seek security in the mere assertion that he did not know.

3. **MATERIAL ALTERATION.** Change in the place of payment with no intention to defraud is a material alteration; change in the

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date; in the sum payable, either for principal or interest; the number or relation of the parties, or the medium of currency in which payment is to be made, or which adds a place of payment where no place of payment is specified, or any other change, or addition, which alters the effect of the instrument in any respect, is a material alteration.

4. **PLACE OF PAYMENT.** The shearing off the place of payment is the same as a change of the place of payment, or the addition of a place, when no place is specified.

5. **ENDORSEE'S KNOWLEDGE.** If an endorsee had actual knowledge at the time he took the note that the place of payment had been removed, or changed, or knowledge of such facts that his action in taking the instrument amounted to bad faith, then he cannot be a holder in due course.

6. **QUESTION FOR THE COURT.** Where the evidence is such that no two reasonable men could differ, such questions should be determined by direction of the court and in this case we find no substantial evidence justifying the submission to the jury of the question of plaintiff's actual knowledge that the place of payment had been removed, or knowledge of such facts as to make the taking amount to bad faith.

7. **ALTERATION: Beneficial: Injurious.** It is equally unimportant whether the alteration was beneficial or injurious. The question is not whether the party has been or could be injuriously affected, but whether or not his rights have been materially affected. It necessarily follows that any alteration of an instrument by which it is made to cover a subject-matter greater, or less, or different than that embraced in it before the alteration is material. The motive with which the words were written is entirely immaterial so far as their effect as an alteration is concerned. A material alteration by one not a stranger to it will avoid the instrument, though innocently made.

8. **ORIGINAL TENOR.** A holder in due course can recover only according to the original tenor of the note.

Appeal from Scott County Circuit Court.—*Hon. Frank Kelly*, Judge.

AFFIRMED.

Leahy, Saunders and *Barth* for appellant.

Gallavin & Finch, and *Oliver & Oliver*, for respondent.

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BRADLEY, J.—This is a suit on a promissory note for $1500 dated May 28, 1915, payable on or before January 1, 1916, interest at eight per centum. This note is as follows:

"$1500 Oran, Mo. May 28, 1915.

"On or before Jan. 1, 1916 after date we promise to pay to the order of C. D. West, Trustee Fifteen hundred————00/00 Dollars For value received negotiable and payable without defalcation or discount and with interest from date at the rate of eight per cent per annum and if the interest be not paid annually to become as principal and bear the same rate of interest until paid. (signed)

PETER DIRNBERGER, M. HELMBACHER.

"Bk. of Oran, Mo.

"Due Jan. 1, 1916. (endorsed on back) C. D. WEST, Trustee."

Upon trial, before the court and a jury, judgment below was for the defendant, and plaintiff appealed.

The payee of the note as originally written was C. D. West. Plaintiff claims to be the holder in due course, for value, and without notice of any infirmities. The defense is that since the signing and delivery of said note it has been materially altered, mutilated and changed in this manner: (1) That the relation of the parties to the instrument has been materially changed by inserting after the name of the payee, C. D. West, the word "trustee" without the knowledge or consent of the defendant; (2) that the end of the note has been cut off, thereby cutting off "payable a" in said note, and inserting "Bk of" over "Oran, Mo." and it is claimed this changed the place of payment; (3) and that some memorandum or writing has been cut off the end of said note, which memorandum or writing rendered said note non-negotiable; (4) that the note was executed on condition that certain merchandise and other property, including some real estate, assigned by Dirnberger to C. D. West as trustee for the benefit of creditors, would be returned to Dirnber-

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ger; and that this property was not returned, and that there was therefore no consideration for the note.

It seems that Dirnberger, who had been conducting a grocery store had not prospered, and was being pressed by creditors. In this situation he made an assignment, and C. D. West, adjuster for the Credit Men's Association of St. Louis was made the assignee. The defendant signed the note with Dirnberger as accommodation maker. The note was filled out by defendant at his residence on a blank form taken from his blank note book at which time it was signed by Dirnberger and defendant, and was delivered to Dirnberger. A blank from defendant's note book was introduced at the trial, and by comparison the portion cut off clearly appears from the photographic copies in the record. Shortly thereafter Dirnberger delivered the note to H. E. Robocker, credit manager of Adam Roth Grocery Company. Robocker soon thereafter delivered the note to West, who on June 5, 1915, discounted the same at plaintiff bank, and the proceeds were deposited to his credit as trustee for Dirnberger, and paid out to the creditors of Dirnberger. Robocker testified that when he received the note from Dirnberger it was in the same condition as at the trial, except the "Bk of" was not on it, and it did not then of course bear the endorsement of C. D. West, trustee. C. L. Allen, assistant cashier of plaintiff bank testified that when he discounted the note for his bank it was in the same condition as at the trial. West testified that he did not think that "Bk of" was written on the note when he received it from Robocker, but that the word "trustee" was in the note when he received it. It is conceded that the word "trustee" was written, and that the end of the note was cut off and "Bk of" inserted, after defendant signed the note, and all this without his knowledge or consent. Two questions arise upon this record: (1) Is plaintiff a holder in due course? (2) Did the addition of "trustee" and "Bk of" and cutting off "payable a" under the circumstances so change the relation of the parties and the

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place of payment as to amount to a material alteration? The statute, section 10022, Revised Statutes 1909, defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The presumption is in favor of the integrity of a negotiable promissory note; but if the note on its face appears to be in different handwriting, written at different times and in different ink, this destroys the presumption of integrity. [Exchange Bank v. Robinson, 185 Mo. App. l. c. 586, 172 S. W. 628, and cases there cited.] An analogous principle is approved in Collison v. Norman, 191 S. W. (Mo.) l. c. 62; Carson v. Lumber Company, 192 S. W. (Mo.) l. c. 1021. In Beavers v. Bank, 177 Mo. App. l. c. 108, 163 S. W. 529, the court says: "It is true that by the Negotiable Instruments Act, section 10022, Revised Statutes 1909, the holder in due course of a negotiable instrument is one who takes such instrument complete and regular on its face, before due, in good faith, for value and without notice, at the time it was negotiated, of any infirmity in the instrument or defect in the title of the person negotiating it and that by section 10026, to constitute notice of such infirmity or defect actual knowledge must exist or knowledge of such facts as will make the act of taking the instrument amount to bad faith." The note sued on, by the most casual inspection shown that the word "trustee" and Bk of" were written in this note in a different handwriting, and in different ink to that in which the balance of the note was written in; ("Bk of" was in pencil) and the evidence shows conclusively that these additions were made at a different time to that when the balance of the note was written. Also

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it is apparent that not less than an inch had been cut off the end, severing about midway the time-honored picture of an indian in full regalia mounted on his charger; and it appears that some writing was in this operation severed from the back of this note, as there was left on the back a loop or dot in ink of some letter or character which the shears did not include; perchance to have included this loop or dot would have invaded too deeply the face of the note. While it is true that by the statute the endorsee must have actual knowledge of infirmities in order to take him out of the class of holder in due course or such facts must appear as to make the taking of the note amount to bad faith; yet it would be shallow reason to permit an endorsee to shut his eyes to things apparent on the face of the instrument, and seek security in the mere assertion that he did not know. The Uniform Negotiable Instrument Law now adopted in most every State was not intended to make the game of hide and seek less difficult, but was intended to render more certain the rights on the one hand and obligations on the other of the parties, whether makers, endorsers, or endorsees.

The appellate courts of our State so far as we are able to ascertain have not determined any case in which sections 10094 and 10095, Revised Statutes 1909, have been in question: (the subject of these sections is material alterations) but other jurisdictions have had identical sections under consideration. In Berks County Trust Company v. Lyte, 95 Atl. (Pa.) 719 Lyte signed a note as accommodation maker for one Lansinger. The note was payable to the order of themselves; both endorsed the note and plaintiff discounted it for value; Lansinger after Lyte had signed and endorsed the note, without the knowledge or consent of Lyte, changed the place of payment. This change was made with no intention to defraud or deceive, but was made because Lansinger had no Berks County Trust Company blank note; and was made apparently to accommodate the trust company to whom he was selling the note. Lansinger advised

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plaintiff that he had made the change when he negotiated the note. Lyte rested his defense upon this change. Pennsylvania's statute in this respect is the same as our section 10094, Revised Statutes 1909, which is as follows: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alterations and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor." Section 10095 must necessarily be considered in connection with section 10094 as they relate to the same subject—material alterations. Section 10095 Revised Statutes 1909, is as follows: "Any alteration which changes: (1) The date; (2) the sum payable, either for principal or interest; (3) the time or place of payment; (4) the number of relation of the parties; (5) the medium of currency in which payment is to be made or which adds a place of payment where no place of payment is specified or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." The Supreme Court of Pennsylvania held that this note was void, because there had been a material alteration, and plaintiff having knowledge thereof could not be a holder in due course. It is urged that the addition of "Bk of" did not change the place of payment, that is was a mere pencil memorandum for convenience of the holder to know some bank to which to send it for collection. If "payable a" had not been cut off the note, and "Bk of" had been inserted as it is, the note would plainly read "payable at Bk of Oran, Mo." This plainly means payable at Bank of Oran, Mo. If the note had been written in the first instance "payable at Bk of Oran, Mo.," what reason could be given that this did not mean "payable at Bank of Oran, Mo." The note originally read "payable at Oran, Mo." Payable at Oran, Mo., cannot be

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construed to mean "payable at the Bank of Oran, Mo." In this connection it is well to notice section 10057, Revised Statutes 1909, which is as follows: "Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. But where the instrument is made payable at a fixed or determinable future time, the order to the bank to pay is limited to the day of maturity only." From this section is will clearly appear why a maker may not desire that his note be payable at a given bank, because such designation is equivalent to an order to the bank to pay the note on its due date, and charge to the account of the maker. Had the defendant desired he would have made this note payable at the Bank of Oran. It cannot be controverted that the note was originally payable at Oran, Missouri, and by the shearing off the end thereof the place of payment as designated was removed. While presentment for payment is not necessary in order to charge the person primarily liable, but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. section 10040, Revised Statutes 1909. The addition noted was originally payable at Oran, Mo., and the shearing off the place of payment if immaterial would result in depriving the defendant of his rights under section 10040, Revised Statutes 1909. The addition of a place of payment where no place is specified is a material alteration. [Section 10095, R. S. 1909, supra.] The shearing off the place of payment is on principle the same as a change of the place of payment or the addition of a place when no place is specified, and if an endorsee had actual knowledge at the time he took the note that the place of payment had been removed or changed or knowledge of such facts that his action in taking the instrument amounted to bad faith (section 10026, R. S. 1909), then he cannot be a holder in due course. These are questions of fact

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for the jury under proper instructions, but where the evidence is such that no two reasonable men could differ such questions should be determined by direction of the court; and in the case at bar we find no substantial evidence justifying the submission to the jury of the questions of plaintiff's actual knowledge that the place of payment had been removed or knowledge of such facts as to make the taking amount to bad faith. To remove or destroy the place of payment might easily affect a party's substantial rights, but that such actually be the result is not necessary. In Gray v. Williams, 99 Atl. (Vt.) 735, while decided before the Negotiable Instrument Law became effective in Vermont, is sound in principle. There the court said l. c. 738: "It is of no importance whether, as a matter of fact, the alteration has changed the situation of the parties. That is material which might become material. It follows that any alteration which may in any event change the rights, interest, duties, or obligations of the parties sought to be charged is material in the legal sense. It is equally unimportant whether the alteration was beneficial or injurious. The question is not whether the party has been or could be injuriously affected, but whether or not his rights have been materially affected. It necessarily follows that any alteration of an instrument by which it is made to cover a subject-matter greater, or less or different than that embraced in it before the alteration is material. It is urged that the plaintiff wrote the words on the note in good faith, honestly believing that he was authorized to do so by Gilbert H. Williams, and intending only to make the instrument conform to the original agreement; that, if defendant's claim be accepted as true, the added words did not make a lien, but were nothing more than a memorandum; but that, if considered an alteration, it did not invalidate the note, as the alteration was made without fraudulent intent. The motive with which the words were written is entirely immaterial so far as their effect as an alteration is concerned. A material altera-

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tion by one not a stranger to it will avoid the instrument, though innocently made." With these observations we hold that plaintiff cannot be a holder in due course. If not a holder in due course without actual knowledge of such infirmities, or without knowledge of such facts as to make the taking of the note amount to bad faith, then plaintiff cannot recover, because the note under such circumstances is void except as against a party who has himself made, authorized or assented to the alterations, and subsequent endorsers. In any event the holder in due course of a note which has been materially altered, except as pointed out in section 10094, Revised Statutes 1909, can only recover according to its original tenor. The maker when the note leaves his hands has only engaged that he will pay it according to the original tenor. [Section 10030, R. S. 1909.] The original tenor with reference to place of payment was Oran, Mo. The removal of the place of payment under the facts here obtaining will defeat recovery; but we will dispose of the other feature of material alteration.

(2). Did the addition of the word "trustee" change the relation of the parties, and amount to a material alteration? In Flintcraft v. Trust Company, 60 Atl. (Pa.) 557, plaintiff conveyed certain real property to one Robinson as trustee. Thereafter Robinson erased from the deed the word trustee, and procured a loan on said property from defendant. Plaintiff sued to cancel the deed. The court, l. c. 559, said: "The removal of the word "trustee" destroyed the identity of the instrument, and altered its legal import, changed the relationship of the parties, and varied the mode of proof concerning their rights." So in the case at bar the insertion of the word "trustee" changed the relationship of the parties, and varied the mode of proof concerning their rights. C. D. West, trustee, is not the same as C. D. West. Andrews v. Sibley et al., 107 N. E. (Mass.) 395, in principle is practically on all fours with the case at bar. There Sibley had given his note payable to an insurance company in

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payment of premiums and delivered same to one Williams. Williams erased the name of the insurance company and inserted his own. After this alteration he negotiated said note by endorsement and delivered it to plaintiff. The Supreme Court of Massachusetts in disposing of that case said: "The plaintiff cannot recover from Sibley on the note. It is conceded that the unauthorized change of the payee's name was a material alteration. The note was thereby avoided as against Sibley, by section 141 of the Negotiable Instruments Act. [R. L. C. 73.] The last sentence of that section, allowing a holder in due course to enforce payment of an altered note according to its original tenor even if applicable, cannot avail the plaintiff, as such a restoration would make the note payable to the order of the defendant insurance company, which never has indorsed it." Section 141 of the Negotiable Instruments Act in Massachusetts is identical with section 10094, Revised Statutes 1909, of our statute, supra. Even if it be conceded that plaintiff in the case at bar is a holder in due course, still it can recover only according to the original tenor of the note. According to the original tenor of the note here in question C. D. West was payee and not C. D. West, trustee. C. D. West has not endorsed this note to plaintiff, but C. D. West, trustee for Peter Dirnberger, has endorsed the note to plaintiff and the conclusion is inevitable that plaintiff took no title by the endorsement of C. D. West, trustee. It appears that Dirnberger added the word "trustee' after defendant had signed the note, and without defendant's knowledge or consent, as the word "trustee" in the face of the note is in Dirnberger's handwriting. By elimination it would appear that Dirnberger cut off the end of the note, and thereby destroyed or removed the place of payment. Lansinger, the maker, changed the place of payment in the note under consideration in Berks County Trust Company v. Lyte, supra. In the Lyte case the place of payment was changed; in the instant case by addition of "trustee" after the name of the payee the relation

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of the parties was changed. Each change falls within section 10095, Revised Statutes 1909. In either case a holder in due course may recover according to the original tenor of the note. [Section 10094, R. S. 1909.] In Berks County Trust Company v. Lyte, supra, plaintiff could not recover because it sued on a note payable at one place, when defendant executed a note payable at a different place than the place mentioned in the note sued on. In the instant case plaintiff had sued on a note payable to C. D. West, trustee, and the evidence shows that defendant executed a note to C. D. West, and plaintiff, therefore, cannot recover. Appellant raises other questions, but the view that we take of this case under the undisputed facts, it is not necessary to go into other matters. It follows from the above and foregoing that the judgment of the trial court should be affirmed, and it is so ordered. *Farrington, J.*, concurs. *Sturgis, P. J.*, concurs in the result and in holding that the inserting of the word "trustee after the name of the payee C. D. West was a material alteration [York v. Jones, 43 N. J. D. 332; Citizens Bank of Ramona v. Grant (Okla.), 152 Pac. 1062,]and so obvious to anyone looking at the note that plaintiff cannot claim to have acquired it without knowledge of its infirmity. [Elias v. Whitney, 98 N. Y. Supp. 667.]

C. H. ROBINSON, Respondent, v. B. F. BUSH, Receiver of the ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO., a Corporation, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **EVIDENCE: Admissions by Agent.** In an action against a railroad company for injuries to a shipment of live stock, testimony as to admissions made by a brakeman of the defendant company, but who was not running on the train carrying the shipment, is inadmissible; for the admissions of an agent can only be received

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against his principal when they are made as a part of the work or business he is doing or transacting.

2. **APPEAL AND ERROR: Review: Harmless Error.** In an action against a railroad company for injuries to a shipment of live stock. The erroneous reception of evidence of admissions of the railroad company's agent not made in the course of his employment cannot be treated as harmless because cumulative or other evidence of the company's negligence.

3. **CARRIERS: Carriage of Live Stock: Action: Negligence: Averment.** In an action for damages to an interstate shipment of live stock in which the carrier's liability was governed by the Carmack Amendment (Act June 29, 1906, ch. 3591, section 7, pars. 11, 12, 34 Stat. 595) as altered by the Cummins Amendment of 1916 (Act Aug. 9, 1916, ch. 301, 39 Stat. 441 (U. S. Comp. St. 1916, sec. 8604a), where plaintiff alleged the negligence of the railroad company instead of relying on its common-law liability as an insurer, he must, having averred the negligence, prove it as alleged, or there can be no recovery.

4. ———: **Liability: Liability as Insurer.** A common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper, although as to those excepted cases the carrier may be liable by reason of negligence.

5. ———: **Carriage of Live Stock: Actions: Evidence.** Where a shipper of live stock alleged that the railroad company was guilty of negligent delay in transportation, the shipper, while having the burden of proving such negligent delay, need not establish it by direct evidence.

6. ———: ———: ———: ———. Under Acts 1913, p. 177, amending Revised Statutes 1909, sec. 3121, declaring that in any action against a railroad corporation for damages on account of its failure to transport live stock within a reasonable time, proof of the failure to transport such live stock within a reasonable time shall constitute prima-facie proof of negligent delay casting on the corporation the burden of showing that the failure was not due to its negligence, held that the question whether a railroad company was guilty of negligent delay in the transportation of a shipment of live stock was for the jury.

7. ———: ———: **Negligence: Proof.** Mere proof of injury to a shipment of live stock while in transit will not make a prima-facie showing of negligent operation so as to cast the burden of disproving negligence on the carrier.

8. ———: ———: **Actions: Evidence: Jury Question.** In an action against a railroad company for injuries to a shipment of live

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stock, the question whether the company was guilty of negligent operation of the train transporting the stock held for the jury.

9. ———: ———: ———: **Liability.** A carrier is not liable for injuries to animals being transported where such injuries result from the propensities of the animals themselves, or from attacks of the other animals.

Appeal from Butler County Circuit Court.—*Hon. J. P. Foard,* Judge.

REVERSED AND REMANDED.

James F. Green and *J. C. Sheppard* for appellant.

A. T. Brewster and *W. A. Welker* for respondent.

BRADLEY, J.—Plaintiff brought suit against defendant for damages to an interstate shipment of horses and mares, shipped from East St. Louis, Illinois, to Paragould, Arkansas. Upon trial before the court and a jury, plaintiff recovered judgment for $340, and defendant appealed.

The horses were delivered to defendant in East St. Louis about 3.30 p. m., September 21, 1916, and arrived at Paragould, Arkansas, at 12:50 a. m., September 23rd, and were unloaded by defendant's agent at 2 a. m. same morning. They were perhaps not loaded on car in East St. Louis until about 5 p. m., and there is no evidence showing just what time they were shipped out of East St. Louis. The distance from East St. Louis, Illinois, to Paragould, Arkansas, is about 254 miles; about thirty-three hours elapsed from the time this shipment was delivered to defendant before it arrived at Paragould. At Illmo, Missouri, about one-hundred and forty-two miles south of East St. Louis, one mare was down and defendant put the other twenty-nine head in a separate car, and made the run from Illmo to Paragould a distance of about one-hundred and twelve miles in eight hours and forty-five minutes. There is no evidence giving the exact time the train pulling these horses arrived at Illmo. The

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conductor who had charge of the train from Illmo to Paragould said his train was due to leave Illmo at 2:30 p. m., and that he left at 4:50. Twenty minutes of this time was lost in the Illmo yards after this conductor had charge of the train, and the balance of the time from 2:30 to 4:50 he said was probably due to the lateness of the train from East St. Louis. Anyway the horses were in the car between twenty-three and twenty-five hours, between East St. Louis and Illmo, or fully ten hours longer than is usual in making the run from East St. Louis to Illmo. When plaintiff delivered the horses to defendant they were in good condition except one mare which plaintiff describes thus: "She had a little skinned place on her ankle, either her right hind ankle or left hind ankle, and she was bruised on her leg just a very slight bit. It wasn't a serious injury. None of the horses were injured. I went into the pens where the horses were, and examined them carefully before I bought them and after I bought them." When delivered at Paragould these injuries were noted by defendant's agent: "One bay mare, eyes swollen; small skinned place on forehead; left knee swollen. One bay mare, skinned place on forehead; right hind leg swollen; eyes swollen; lost colt; one bay mare, skinned place on forehead; eyes swollen; one brown mare, eye punctured and eye out; one small bay mare, lost colt; skinned place on hip and tail; one iron gray, cut under ankle, right hind foot; one black mare, skinned all over; eyes and head swollen; hole in hip; swollen all over; lost colt." Plaintiff testified to many other injuries than these noted; stating that every horse and mare in the shipment were "just bunged up in different ways."

Defendant makes four separate assignments of error, but the view we take it will not be necessary to consider but two: (1) Alleged error based upon admission in evidence of alleged incompetent evidence; (2) the failure of the court to give a peremptory instruction for defendant; this assignment is based upon the proposition that plaintiff bottomed his cause of

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action on negligence and not upon the carrier's common-law liability as an insurer; and defendant contends that plaintiff failed to make proof of sufficient negligence to justify the submission of the case to the jury.

On the admission of evidence: W. E. Beacham, a witness for plaintiff over defendant's objection and exception was permitted to testify about what one Jake Harris told him concerning the supposed cause of injury to these horses. Harris was a brakeman and his run was between Illmo and Paragould; and Beacham says that Harris told him at Piggott, a station between Illmo and Paragould, that this car of horses was "wrecked." Beacham on being recalled testified over the objection and exception of the defendant: "A. Yes, sir; he told me they had started with the car. Q. What car. A. Why, the car of horses, car of horses shipped to Robinson. Q. What did he tell you about that car? A. They had brought the car back and set it out at Illmo yards. Q. What was the occasion of the conversation? A. I asked him if he had a car of horses billed for Robinson at Paragould, and he said he thought there was a car for him—this was at Piggott, and I had called up the yard office and they said there was no car for us; Mr. Harris said they had started out with this car for Paragould, but had pulled out a drawbar, or something like that, and he thought some of the stock was injured, that one of them was killed; and they had set it out at the Illmo yards. Q. What effect did he say the pulling of the drawbar had upon the stock? A. He said it had injured some of the stock and he thought one of them was killed" On cross-examination: "Q. Did you say Mr. Harris told you he was brakeman on this particular train that had this carload, that took it to Paragould? A. He said they started out of the yards with it. Q. I say did he tell you he was braking on that train? A. He said they started with it, the train he was working on. Q. Where? A. Out of the Illmo yards. Q. They first started out with it from the Illmo yards? A. Yes, sir. Q. Where was it then that the drawhead

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was pulled? A. He said about the Illmo yards. Q. He didn't say they took it out of there? A. No, sir. Q. He didn't say he was working on that train at the time the drawhead was pulled? A. He said his train had a load. Q. He had one? A. Yes, sir; he had one load going south. Q. Down the Cotton Belt? A. Yes, sir. Q. Cotton Belt run into Paragould? A. Yes, sir. Q. Which road does he work for? A. Iron Mountain, I suppose. Q. Do you know? A. I don't know for sure. Q. You don't know? A. No, sir. Q. Was he working for the Iron Mountain or for the Cotton Belt? A. My understanding was—Q. From what he said? A.—that he was in the employ of the St. Louis, Iron Mountain and Southern Railway Company. Q. Did he tell you that? A. I don't think right at that time he did—he has told me—but I don't think he told me that day. Q. Did Jake Harris say he was there? A. No; I don't know that he said he was right there. Q. *Somebody else told him about it?* A. *He didn't say, he just told me about it when I asked about the car. Q. Didn't say whether he had just heard it or whether he had seen it?* A. *He didn't say.* Q. You don't know whether it was this load or not? A. Yes, sir; it was this load. Q. Did he say it was this load that went to Paragould for Robinson? A. Yes, sir. That was on Friday, on the 22nd, I reckon. The horses were not at Paragould then. Harris said they were at the Illmo yards when he left." It is apparent that Harris may have been telling what someone else told him. It was shown by the conductor of the train which pulled this car from Illmo to Paragould that Harris was not connected with the train in any manner, but was brakeman on a different train; and that nothing happened to the train that transported these horses from Illmo to Paragould; and this conductor says: "I took this carload of freight consigned to Robinson from Illmo to Paragould. There were no drawbars pulled out in any of the cars of my train, or any other train carrying this stock out of Illmo. None of these cars was broken or injured, or had anything the

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matter with them at all." Plaintiff undertakes to justify the admission of this evidence on the ground that Harris was the agent of defendant, and the admission of the agent in the circumstances would be competent against his principal. But this is upon the theory that such admission was made concerning a fact which the agent observed at the time of the happening thereof, and while engaged in the performance of his duty in connection therewith. The principle is well illustrated in Parr v. Ins. Co., 178 Mo. App. l. c. 160, 165 S. W. 1152, where it is said: "The rule against admitting the statements or declarations of an agent, unless made in doing an act within the scope of his authority, is well known. The difficulty is in making an application of the rule. The declarations of an agent, relied upon to bind the principal, rest upon a different footing from admissions offered to bind the person making the admission. Every one has the legal right to make an admission against himself whether true or not, and he has no right to complain of the use of such admission as binding upon him. But he ought not to be held responsible, on this principle, for admissions made against him by an agent, unless those admissions or declarations are made as a part of the work or business he is doing or transacting under authority of his principal. In such case they are not admissible upon the theory that they are admissions made by the principal through his agent, but on the theory that they are a part of the act done by the agent in behalf of his principal and explain or determine the quality of that act and are therefore as binding on the principal as the act itself. In other words, they are admissible because they are a part of what the courts (for want of a better term), call the *res gestae*, i. e., the thing done or the transaction carried out, and to which the admissions relate." This principle is again clearly set forth in Atkinson v. School of Osteopathy, 240 Mo. l. c. 338, 144 S. W. 816; and in Bevis v. B. & O. Ry. Company, 26 Mo. App. 19, McDermott v. The Hannibal & St. Joseph Railroad Co.,

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73 Mo. 516. Respondent further seeks to justify the admission of the evidence on the theory that it was merely cumulative, and only tended to prove negligence which was already established, but as we view the record this evidence cannot be passed over on this ground. This purported to be a positive admission by the defendant that the car was wrecked, and no doubt impressed the jury equally as much and perhaps more than any other evidence offered tending to show negligence.

On the request for a peremptory instruction: The grounds upon which plaintiff seeks recovery as shown by his petition are: "Plaintiff further states that said mares and horses should have been delivered to plaintiff at Paragould, Arkansas, within twenty-eight hours from the time said mares and horses were delivered to and accepted by said defendant at National Stock Yards, Illinois, if shipped, carried and transported by said defendant with due care and reasonable dispatch; that defendant wholly disregarding its duties as such carrier, negligently and carelessly furnished and provided a car at National Stock Yards, Illinois, in which to load said mares and horses, which was broken and out of repair, that it was wholly unfit and inadequate to contain said horses and mares; that said horses and mares were loaded into said car by defendant's agents, servants and employees, or caused to be loaded in said cars by said defendant's agent, servants and employees, and that said car was so negligently and carelessly handled by defendant, his agents, servants and employees, that said car became so completely and totally wrecked between National Stock Yards, Illinois, and Paragould, Arkansas, that said horses and mares were, by the defendant unloaded from said car and re-loaded into two other cars in which said cars they were delivered to plaintiff at the station of Paragould, Arkansas; that defendant by its agents, servants and employees, negligently and carelessly failed to ship, carry and transport said mares and horses to said station of Paragould, Arkansas, without delay and in

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good condition, but on the contrary, by its agents, servants and employees, negligently and carelessly so operated their railroad, trains and locomotives over, in and by which said horses and mares were carried, shipped and transported as to prevent their delivery to this plaintiff at said station of Paragould, Arkansas, until more than forty-eight hours after said mares and horses were delivered to and accepted by defendant at National Stock Yards, Illinois, as aforesaid. Plaintiff further states that defendant otherwise, and as aforesaid so roughly, negligently and carelessly handled, shipped, carried and transported said mares and horses together with the unreasonable delay aforesaid, that thereby and as a result thereof," certain injuries resulted. While plaintiff stated in his petition that the usual time for livestock shipment between East St. Louis and Paragould, Arkansas, is twenty-eight hours, the evidence shows it to be from eighteen to twenty hours. It appears from the evidence that at Illmo twenty-nine head of these horses were transferred to a different car, because one was discovered to be down. This one down was left in the original car and it alone was shipped in the original car from Illmo to Paragould. Inspection of both cars at Paragould disclosed no defects. In Bockserman v. Railroad, 169 Mo. App. l. c. 172, 152 S. W. 389, a case where recovery was sought upon the grounds of negligence of the carrier, the court said: "With the case in this aspect, it devolves upon the plaintiff to show negligence, for he grounds his cause of action on that score alone in the petition. Under the more recent decisions of our Supreme Court it is said that it must be taken as the established law of this State, that, when the cause of action against the carrier stands on the ground of negligence on the part of the carrier; the burden of proof is upon the plaintiff to make good the charge laid. In other words, that the party who founds his cause of action on the negligence of the carrier with respect to the transportation of freight must be prepared to establish the assertion by proof, and the burden of proof is on him from the

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beginning to the end of the case." Further on in this same case, l. c. 174, it is said: "On the other hand, the common-law obligation of the initial carrier under a contract of through shipment is not declared upon in the petition, for it avers a loss through defendant's negligence and carelessness." Nor does the fact that in the case at bar the shipment was an interstate shipment change this rule. The identical question was presented in Smith & Son v. Railroad, 177 Mo. App. 269, 164 S. W. 132, an interstate shipment and there the court said, l. c. 275: "At the beginning of our investigation of the questions argued by defendants in support of the demurrers to the evidence we find a pleaded cause founded not on the common-law liability of a carrier as an insurer, but on a specified act of negligence. In such case the plaintiff takes the burden and must carry it to the end of proving that his damages resulted from the alleged cause and from no other. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case. [Citing cases.] Under this rule the burden is on plaintiffs to show that their damages were caused by negligence of defendants in furnishing a defective car." To the same effect is Keithley and Quinn v. Lusk et al., 190 Mo. App. 458, 177 S. W. 756. At l. c. 463, of this case it is said: "As plaintiffs sue for specific negligence in not keeping open the ventilators of the car, they must recover on such specific negligence." [Citing Smith & Son v. Railroad, supra, and other cases.] This shipment is governed by what is generally known as the Carmack Amendment to the Interstate Commerce Act as amended by the Cummins Amendment in 1916 (8 U. S. Comp. Stat., sec. 8604a). We do not mean to infer that plaintiff is limited by the Federal Act, supra, to a suit based solely on negligence; but that where he bottoms his cause of action on negligence and

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not on the common liability as an insurer he is bound by the route he chooses. He will not be permitted under the decisions, supra, to select one route and reach his goal by another which he did not plead nor rely upon in the trial court. This for the reason that the defendant is brought into court on a specific cause of action, and is not required to defend against any other cause of action which plaintiff may have, but has not pleaded. The common-law liability of the carrier is stated in 10 C. J. 110 thus: "The rule might now be more fully stated as being that the common carrier is liable for: all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper, it being understood that as to all of these excepted cases the carrier may be liable by reason of his own negligence or that of his agents, servants or employees." For Missouri cases in point on the inherent nature or quality see Vail v. Pacific R. Company, 63 Mo. 230; McFall v. Wabash R. Company, 117 Mo. App. 477, 94 S. W. 570; Cash v. Wabash R. Co., 81 Mo. 109; Hance v. Pacific Express Co., 48 Mo. App. 179. In Botts v. Railroad, 191 Mo. App. l. c. 682, it is held that the fault of the shipper would relieve the carrier of liability.

But conceding that when the shipper has grounded his cause on negligence that the burden is on him from the beginning to the end, it does not follow that the shipper must prove by direct evidence the negligence upon which he relies. However in the case at bar plaintiff made positive proof of delay, and whether this was unreasonable delay is a proper question for the jury. What might be unreasonable under one state of facts might not be so considered under another. But, because no doubt that the causes usually giving rise to delay are peculiarly within the knowledge of the carrier, the Legislature (Acts 1913, p. 177), amended section 3121, Revised Statutes 1909, by adding this proviso: "Provided, that in any action brought by a shipper against any railroad corporation for damages

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on account of the failure of such railroad company to transport live stock within a reasonable time, proof of the failure of such railroad corporation individually, or in connection with a connecting carrier, to transport such live stock within a reasonable time shall constitute prima-facie proof of negligent delay in the transportation of such live stock, on the part of the railroad corporation or corporations transporting such live stock, and the burden of proof shall then be upon such railroad corporation to show that the failure to transport such live stock within a reasonable time was not due to its negligence." Dawson Bros. v. C. B. & Q. Railroad Company, 194 S. W. (Mo. App.) 743, was an interstate shipment but it is illustrative of the charge of unreasonable delay under the statute, supra. That suit was for damages for extra shrinkage and decline of market on a carload of hogs on account of negligent delay in transporting them. In this case l. c. 744, the court says: "The act of March 20, 1913 (Laws of 1913, p. 177), amending section 3121, Revised Statutes 1909, provides that proof of failure to transport within a reasonable time shall constitute prima-facie proof of negligent delay, and the burden of proof is then on the railroad to show that the failure to transport within a reasonable time was not due to its negligence. Of course, plaintiff must first offer evidence tending to show that the delay was unreasonable. But we think this was done." Plaintiff in that case made proof similar to the evidence in the instant case on the charge of negligent delay by showing the usual time in shipments of the character there in question between the points of receipt and destination. In Baker v. Bush, 194 S. W. (Mo. App.) l. c. 1061 this court in considering an alleged unreasonable delay said: "It is true that it has been held that where a shipper of live stock brings an action against a carrier on the ground of negligence he cannot recover on mere proof of delay without evidence of negligence (McDowell v. Railway Co., 167 Mo. App. 576, 152 S. W. 435), but the General Assembly of 1913 passed an act (Laws 1913, p. 177)

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wherein it is provided that proof of the failure to transport live stock within a reasonable time shall constitute proof of negligent delay in transportation, and that the burden of proof shall then be upon the carrier to show that its failure was not due to its negligence; this upon the common sense theory of placing the burden of explanation upon those who are in possession of every detail of the trip. [Sikes v. Railroad, 190 Mo. App. l. c. 189, 190, 176 S. W. 255.]" In Riddler v. Railroad, 184 Mo. App. l. c. 713, where a question of unreasonable delay was involved respecting an interstate shipment, the court said: "The plaintiff's evidence showed that there was a delay of nearly double the usual time required for such a shipment. This was proof of a failure to transport within a reasonable time, and, under section 3121, Revised Statutes 1909, as amended by the Act of March 20, 1913, Laws of Mo., 1913, p. 177, made out a prima-facie case of negligent delay." There can hardly be room for controversy on the plaintiff's right to go to the jury on the charge of unreasonable delay.

Did plaintiff make sufficient proof in support of his charge of negligent operation to entitle him to go to the jury on that question? This is not always any easy matter to determine as is often the case; plaintiff is unable to show more than the fact that he delivered his stock in good condition and that they were delivered at destination in bad condition. Just when the character and extent of the injuries will amount to substantial evidence of negligent operation so as to take that charge to the jury must, because of the very nature of the question, depend upon the circumstances of each particular case. It appears to be well settled however in this State that mere proof of injury while in transit where the petition is grounded on negligence will not make a prima-facie showing of negligent operation so as to cast the burden of disproving negligence upon the carrier. [Witting v. Railroad, 101 Mo. 631, 14 S. W. 743; Bockserman v. Railroad, 169 Mo. App. l. c. 172, 152 S. W. 389;

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Smith & Son v. Railroad, 177 Mo. App. 269, 164 S. W. 132; Keithley & Quinn v. Lusk et al., 190 Mo. App. 458, 177 S. W. 756, and other authorities cited, supra.] In the case at bar there was no direct evidence of plaintiff's general charge of negligent operation of the train, but this may be inferred from all the facts and circumstances in evidence, the principal of which circumstances are the character and extent of the injuries to plaintiff's horses. In Botts v. Railroad, 191 Mo. App. l. c. 680, 177 S. W. 746, the court said: "In the case of inanimate freight, the common carrier is an insurer and the duty devolves upon him to deliver the goods intact at the point of destination; but there is an exception to this rule with respect to the shipment of live stock, which arises because of the inherent vice or propensities of the animals. Because of this exception, it is essential to show a state of facts or circumstances from which negligent conduct may be inferred on the part of the carrier, in order to affix liability against it. But, as before said, it is not essential to show positive acts of negligence and the circumstances attending the shipment may be such as to afford a fair inference of dereliction of duty on the carrier's part. In this view, it has heretofore been said by this court, in the case of a shipment of poultry, that, where it appeared the poultry was delivered to the carrier in good condition and after a comparatively short run delivered to the consignee with a large percentage of the poultry dead and that such death rate in shipments of like character was so extraordinary that its parallel could not be shown, the shipper made out a prima-facie case of negligent conduct on the part of the carrier so as to cast the burden of proof upon it. [See Hance v. Pacific Express Co., 48 Mo. App. 179.]" In Cash v. Railroad, 81 Mo. App. l. c. 115, the Kansas City Court of Appeals, per GILL, J., states the matter thus: "And now as in the Hance case, so in this, the physical injuries inflicted and shown on the animals when they arrived at St. Louis were of such a character as to justify the inference that the stock was maimed,

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bruised and crippled, not by action of their own vitality or vicious propensities, but were damaged by the careless or unskillful management of the car or train. The jury had the right to consider the management of the car or train. The jury had the right to consider the circumstances and draw therefrom any reasonable inference consistent therewith. And in the light of these patent facts the jury found that the horses were injured by the negligent operation of the train." To the same effect is Libby v. Railroad, 137 Mo. App. l. c. 282, where it is said: "There is no direct testimony whatever as to how the crippled steer was injured. It appears to have been in good condition when delivered to the defendant and severely bruised, skinned, and otherwise crippled when arriving at the point of destination. When these facts are considered together with the fact that thirty-one hours were consumed in transit for a shipment which should have been made in eight or ten hours and that such injuries were unusual, or at least not usually incident to a shipment with due care, we believe the question of how the steer was injured, should be referred to the jury." [Citing Hance v. Express Co., and Cash v. Railroad, supra. See, also, Cunningham v. Railroad, 167 Mo. App. 273, 149 S. W. 1151; Cudahy Packing Co. v. Railroad, 196 Mo. App. 528, 187 S. W. 149; Blackmer, etc., Co. v. Railroad, 196 Mo. App. 139, 190 S. W. 1032.] When the character and extent of the injuries to these horses are considered, we think that there was no error in submitting to the jury the question of plaintiff's charge of negligent operation of the train. In a great number of the cases similar to the one at bar the shipper has shown by experienced stockmen that the injuries complained of are not such as usually happen in shipments of the character in question, which evidence tends to establish the usual allegation of negligent handling of train. Where fairminded men whose experience in handling and shipping animals of the character under consideration in any given case has been such as to qualify them to speak in the nature of

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an expert, they are much better prepared to say that certain injuries occurring in transit to animals are unusual and out of the ordinary, or otherwise than are men who are not thus experienced; and such evidence ought to be offered. A question of fact naturally arises in the instant case based upon the nature of the injuries to the horses. If such injuries might in the ordinary course of transportation result from the inherent nature of the horses themselves, then that becomes a question of fact to be determined like any other fact. As pointed out, supra, damages resulting from the inherent character of the thing shipped is one of the exceptions to the common-law liability of the carrier as an insurer. The exception is stated in 10 C. J. 123, thus: "The rule established from motives of policy, which charges the carrier in almost all cases is not unreasonable in its application to inanimate chattels. But the carrier of animals by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases supposing all proper care and foresight to have been exercised by the carrier it would be unreasonable in a high degree to charge him with the loss." We think however that the injuries to the horses and mares in the case at bar were of such character and extent as to justify the submission of the cause to the jury upon the charge of negligent operation of the train. Defendant's request for a peremptory instruction was properly refused.

For the error noted above in admitting the evidence of the witness Beacham, this cause is reversed and remanded. *Sturgis, P. J.*, and *Farrington, J.*, concur.

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M. T. WARREN, Appellant, v. ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al. Respondents.

Springfield Court of Appeals, February 6, 1918.

1. **WRIT OF ERROR CORAM NOBIS.** This ancient writ is frequently invoked to aid our code to the end that substantial justice may be done. It is parcel of that procedure which came to us from the common law. It issues out of the court in which the record lies and predicates upon errors of fact and not errors of law. It would lie at common law when the court had proceeded as though a fact which was material to its right to proceed existed, when it did not exist, and when the absence of the fact assumed to exist entirely defeated the power of the court to attain a valid result in its proceeding. Where defendant dies after service of process, and before judgment, the writ of error *coram nobis* is the proper remedy.

2. **VACATING RECORD OF SATISFACTION OF JUDGMENT.** Vacating the record of satisfaction was a mere incident to the setting aside of the judgment, because the moment the judgment was set aside it ceased to exist. The purpose of the acknowledgment of satisfaction is to destroy the lien on the property of the judgment debtor. Destruction of the judgment destroys the lien thereof.

3. **ATTORNEY'S LIEN.** An attorney has a lien, as between himself and his client, upon the cause of action and judgment for his fee.

4. **AGREED STATEMENT OF FACTS.** Where an attorney, without any reservation, participated in settling an agreed statement of facts, and made no special appearance in the agreed statement, thereby elected to plead to the mertis, and will not be heard, afterwards, to say that he was not properly called into court.

5. **ERRONEOUS JUDGMENT.** Where a party has been wronged by an erroneous judgment which is reversed on appeal, it is not necessary for the party seeking restitution of what he has lost to bring a separate action, but all the parties being in court, the court will right the wrong with all possible speed.

6. **VOLUNTARY PAYMENT OF JUDGMENT.** Money paid upon a judgment with full knowledge of all the facts cannot be recovered. Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involun-

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tary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either and the payment is made to prevent it. But money paid with full knowledge of all the facts and without fraud cannot be recovered because of ignorance as to legal liability. Money voluntarily paid to satisfy a judgment afterwards reversed cannot be recovered where it appears that the original claim was a just one. There are cases in which the right of recovery has been maintained although the judgment was voluntarily paid on the ground that although the payment was voluntary yet defendant having received it of the plaintiff to which in *ex aequo et bono* he was not entitled, the same was recoverable as for money had and received. On the other hand money paid in satisfaction of a judgment afterwards vacated and the party to whom it was paid was not in equity entitled thereto, may be recovered.

7. **VACATION OF JUDGMENT: Parties.** Judgment of restitution should not be rendered against one who was not entitled to any part of the judgment, and who had received no part thereof.

8. **PRESUMPTION OF DEATH.** Presumption of death arises where a person has absented himself for seven years and has not been heard from.

Appeal from Greene County Circuit Court.—*Hon. Arch A. Johnson,* Judge.

AFFIRMED AS TO M. T. WARREN AND O. T. HAMLIN, AND REVERSED AS TO W. W. HAMLIN AND L. L. COLLINS.

Hamlin & Hamlin, for appellants.

Tatlow & Mitchell, for respondents.

BRADLEY, J.—On August 21, 1914, plaintiff, M. T. Warren, filed her petition in the circuit court against the defendant, Mutual Benefit Department of the Order of the Railway Conductors of America, and afterwards on January 3, 1917, an amended petition was filed making the Order of Railway Conductors of America, a party defendant. Defendants limited their appearance to a plea to the jurisdiction. The trial court on February 3, 1917, overruled the plea to the jurisdiction, and upon trial, judgment went in favor of plaintiff.

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The facts are as follow: Andrew L. Warren, husband of plaintiff, on the 22nd day of February, 1907, had a policy or certificate of insurance then in full force in the Mutual Benefit Department of the Order of Railway Conductors of America, in which plaintiff was named as beneficiary. Warren disappeared on the last-named date, and was not heard of until March, 1917. After waiting more than seven years after the disappearance of her husband, plaintiff filed suit on the policy. It does not appear why, but the case was passed from term to term covering a period of some two years and six months. On February 2, 1917, at the January term of the circuit court upon a trial before the court without a jury, judgment went for plaintiff. On the 5th day of February defendants filed their motion for a new trial and in arrest. No action was taken on these motions until the 24th day of February, at which time the defendants appeared in open court and announced that they were ready and willing to pay the judgment rendered against them, and the motions were thereupon overruled, the judgment and costs were paid, and plaintiff by her counsel in open court acknowledged satisfaction; all of which matters were entered of record. The certificate or policy sued on, being at that time misplaced, plaintiff by her attorneys gave a receipt for the policy which receipt provided that in the event the policy was found, it would be delivered to defendants. Counsel for plaintiff had a contract by which the fee was contingent upon recovery. Upon the payment of the judgment, plaintiff, and her counsel received their respective proportions thereof according to contract.

In these circumstances defendants appeared in court on the 19th day of March, 1917, during the same term at which judgment was rendered, and filed a motion or written suggestions asking that the judgment be set aside, and that plaintiff and her counsel be required to make restitution. The motion or suggestions recited the fact of judgment, payment and satisfaction; and charged that the insured, Andrew

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L. Warren, was not dead at the time the judgment was rendered, but was, at that time, and was then, alive. Notice of the filing of this motion, and that it would be called up for hearing on March 24th was duly served upon plaintiff, and was served upon W. W. Hamlin of the firm of Hamlin, Collins & Hamlin, counsel for plaintiff. The hearing of this motion was passed until the 14th day of April, which was still the January term. At the hearing of this motion the parties made the following admissions, upon which the court determined the motion:

"It is admitted that said judgment has been paid and fully discharged and satisfaction entered in open court, and that since the satisfaction of such judgment the plaintiff and defendants have learned that Andrew L. Warren did not depart this life on the 22nd day of February, 1907, as alleged in the petition, or at any other time, but that on the 3rd day of February, 1917, at the time said judgment was rendered, the said Andrew L. Warren was then and still is in full life. It is further admitted that at the time the said judgment was satisfied, to-wit; on the 24th day of February, 1917, the attorney for plaintiff had mislaid the certificate sued upon and was unable to produce the same so as to turn it over to the defendant at the time of the satisfaction of the judgment, and that the defendant in addition to the satisfaction of the judgment, in open court took a receipt from plaintiff showing the satisfaction thereof, and that the certificate was to be turned over to defendant if the same should be found. It is further admitted that neither the plaintiff nor Andrew L. Warren paid any assessments under the said certificate of insurance since the 22nd day of February, 1907, which kept the certificate in force until April, 1907, (1917) as the said Andrew L. Warren was required to do by the constitution and by-laws and the terms of said Order, as well as the terms of said certificate, in order to keep the said insurance provided for by the terms of said certificate in force, and that on the said 24th day of February, 1917, when the said

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judgment was satisfied of record as aforesaid, nothing had been paid as dues or premium on the said certificate of insurance by the said Warren since February 22, 1907, because the plaintiff believed her husband Andrew L. Warren had died on or about February 22, 1907. That the defendants have not at any time tendered back to the plaintiff the receipt taken at the time of the satisfaction of the judgment as aforesaid. It is further admitted that the plaintiff in good faith instituted and prosecuted the action to judgment on said insurance policy believing Andrew L. Warren to be dead. It is admitted that Hamlin, Collins & Hamlin had no interest in said judgment other than attorneys for the plaintiff. That under the contract with the plaintiff, O. T. Hamlin was to be paid by the plaintiff as a contingent fee one-half of whatever might be recovered by the plaintiff in this case and that he, the said attorney received from the defendant a check for the full amount of the judgment and cost, and after paying the cost, he accounted to and paid the plaintiff one-half thereof and retained the other half under his said contract."

The trial court upon the hearing of the motion set aside the judgment and ordered the plaintiff to return to defendants the amount of money she had received as the proceeds of the judgment, and ordered the firm of Hamlin, Collins & Hamlin counsel for plaintiff to return to defendants the amount of money received by them as the proceeds of the judgment, and also ordered the clerk of the court to return to defendants the amount paid to him as costs and execution was ordered to issue to satisfy said order and judgment for restitution. From the action of the court in setting aside the judgment and the satisfaction thereof, and ordering restitution as aforesaid, plaintiff, and her counsel appeal to this court.

Appellants assign as error: (1) The act of the trial court in setting aside the judgment, and the satisfaction thereof; and (2) the order and judgment for restitution against plaintiff, and her counsel.

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I.

Learned counsel for appellants in their brief concede that the trial court had the power and authority during the term which the judgment was rendered, independent of any motion or suggestion, to set aside the judgment for good cause. But, they say, since the fact, that Warren was alive at the time the judgment was rendered, and paid, was called to the attention of the court by the motion, that as a consequence the court in dealing with this motion was bound by the law governing the common-law writ of error *coram nobis*. This ancient writ is frequently invoked to aid our code, so to speak, to the end that substantial justice may be done. In Cross v. Gould, 131 Mo. App. l. c. 597-598, 110 S. W. 677, Judge NORTONI of the St. Louis Court of Appeals very clearly defines the purposes of this writ, and gives numerous instances where it may be invoked. It is there said: "A writ of error *coram nobis* is parcel of that procedure which came to us with the common law. It issues out of and for the purposes of review by the same court in which the record lies and predicates upon errors of fact as contradistinguished from errors of law. Besides for error in process through the default of the clerk, the writ would lie at common law when the court had proceeded in a case as though a fact which was material to its right to proceed, existed, when it did not exist, and when the absence of the fact assumed to exist, entirely defeated the power of the court to attain a valid result in its proceeding. It may be taken as a proposition settled entirely beyond controversy in the law of this country and England that the writ of error *coram nobis* does not go to errors arising on facts submitted to a jury, referee, or to the court sitting as a jury to try the issues of fact. Nor will this writ lie for the purpose of correcting errors of law." Many instances where this writ may be invoked are cited in Cross v. Gould, supra, and among them are: Where judgment had been given against an insane person, as though sane, it was held

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to be such an error of fact not appearing on the record as essentially invalidating the proceedings, the judgment was set aside on writ of error *coram nobis*. [Heard v. Sack, 81 Mo. 610; Adler v. State, 35 Ark. 517.] Where the defendant dies after sevice of process, and before judgment, the writ of error *coram nobis* is the proper remedy to set aside the judgment for the reason it is an error of fact not appearing on the record which renders the judgment invalid. [Calloway v. Nifong, 1 Mo. 223; Dugan v. Scott, 37 Mo. App. 663.] Where it appeared affirmatively by the sheriff's return one defendant was not served, and through error counsel representing the other defendants answered as though they also represented the one not served; it was held that a writ of error *coram nobis* filed at a subsequent term was a proper remedy to set the judgment aside. [Craig v. Smith, 65 Mo. 536; Warren v. Lusk, 16 Mo. 102.] Other instances may be found by reference to Cross v. Gould, supra, but enough here are given to show the character of facts to which the writ of error *coram nobis* goes.

From the above learned elucidation upon the writ of error *coram nobis*, by Judge Nortoni, in the light of the facts of the instant case, it clearly appears that the motion filed to set aside the judgment in the case at bar is in no sense in the nature of a writ of error *coram nobis*. It is appearent that the error of fact upon which the court was asked to act in setting aside the judgment was upon a fact which would be submitted to a jury, or the court sitting as a jury. This fact of course was the alleged death of Warren, without proof of which plaintiff could not recover.

The trial court in its order setting aside the judgment says: "It is therefore ordered, considered and adjudged by the court that the suggestions and motion heretofore filed by the defendants to set aside and vacate the judgment heretofore rendered and satisfaction thereof, and require restitution to the defendants, be and is hereby sustained, and the said judgment as well as the satisfaction thereof on the suggestions

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and motion aforesaid as well as under the power of the court to revise and correct during the term its judgments of its own motion, is hereby vacated, annulled and set aside."

It clearly appears therefore that the learned trial court invoked its power to set aside the judgment independent of any motion or suggestion. It cannot be controverted that the court found as a fact the death of Warren, when in truth that was not the case. Plaintiff made a prima-facie showing that Warren was dead by offering evidence that he had absented himself for seven years, and had not been heard from. The presumption of his death as a consequence followed, and no evidence was offered to rebut this presumption; the trier of facts therefore found this issue in favor of plaintiff; and upon the discovery by the court that a grave error of finding of fact had been made, the judgment while yet in the breast of the court was set aside. The manner of calling the court's attention to this error we consider not material. Had the learned Judge of the trial court made the discovery that Warren was alive during the term it would have been his duty to set aside the judgment. Section 2022, Revised Statutes 1909, provides that: "In every case where there has been a mistake or surprise of a party, his agent or attorney, or a misdirection of the jury by the court, or a mistake by the jury, or a finding contrary to the direction of the court, or a fraud or deceit practiced by one party on the other, or the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the proper party, has a just cause of action or of defense, it shall, on motion of the proper party, grant a new trial, and, if necessary, permit the pleadings to be amended on such terms as may be just." The action of the court in setting aside the judgment in the instant case is analogous in principle to the perjury or mistake clause of the statute quoted above. To illustrate: Suppose that instead of relying on the pre-

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sumption of death by absence, plaintiff had been relying upon proof of death in fact; and had introduced her evidence, proving by witnesses that Warren was dead; and that the issue of his death was so determined, and judgment rendered; and thereafter and before the term ends, the court is advised that Warren was in fact not dead and this be admitted as in the instant case. Can it be said that the court would need any writ, paper, or pleading to authorize the setting aside of such judgment? We think not. There can be no doubt about the authority of the trial court to control its orders, and judgments during the term at which they were made or rendered, and that such may be modified or set aside in the interest of impartial justice is not controverted. [Ewart v. Pennington, 233 Mo. 695, 136 S. W. 422; Craton v. Huntzinger, 187 S. W. (Mo.) 48.]

Vacating the record of satisfaction was a mere incident to the setting aside of the judgment, and was the natural consequence, because the moment the judgment was set aside it ceased to exist. The only purpose of the acknowledgment of satisfaction is to destroy or release the lien on the property of the judgment debtor. A destruction of the judgment *ipso facto* destroys the lien, so it is not necessary to deal further with the order vacating the acknowledgment of satisfaction.

Upon the facts obtaining here did the court have the authority to order restitution and execution to enforce its order? In Lanyon et al. v. Chesney et al., 209 Mo. 1, 106 S. W. 522, plaintiff and defendant entered into an agreement whereby plaintiff was selling certain property to defendant. Defendant did not comply with the terms of his agreement as to payments, and had managed to get possession, although he had no deed. Plaintiff filed suit for specific performance of the contract to buy, and asked judgment for the balance due, and tendered the proper deed in court. Judgment was given on the pleadings for plaintiffs, and this judgment was declared a lien upon the property

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in question. Defendant appealed and this judgment was reversed, and cause remanded; but pending the appeal one of the plaintiffs obtained possession of the property under and by virtue of the judgment afterwards vacated. After the cause was remanded for a new trial and while in possession plaintiffs in vacation dismissed. At the first term thereafter defendants filed their motion asking that the cause be reinstated, and they be given restitution of the premises, and damages for the wrongful detention and for various other reliefs and orders. On the hearing of this motion the court ordered restitution, and gave judgment for damages, and directed that execution issue, but overruled the motion as to all other matters, among which was the demand that the cause be reinstated. Defendants not satisfied with this judgment appealed and the Supreme Court sustained the action of the trial court in refusing to reinstate the case, and affirmed the order or judgment for restitution and damages. Plaintiffs resisted this motion for restitution and damages in the trial court, and on appeal, on the ground that the cause had been disposed of in vacation, and that, therefore, the court had no jurisdiction in the premises as to any feature of the motion; but speaking anent this subject the Supreme Court said: "We entertain no doubt as to the right of defendants to have restored to them, as against the other parties to this action, any property or property rights of which they were deprived and which plaintiffs acquired under the first judgment, whether by execution or otherwise, and that such right will not in any way be affected by plaintiff's dismissal of their suit after obtaining possession of such property. And this, too, without regard to the merits of the original cause of action or grounds of defense."

This principle is supported by the following authorities: Turner v. Edmonston, 210 Mo. l. c. 421, 109 S. W. 33; Gott v. Powell, 41 Mo. 416, Vogler v. Montgomery, 54 Mo. 577; Jones v. Hart, 60 Mo. 362; Colburn v. Yantis, 176 Mo. 670; Carson's Admr. v. Suggett's Admr.,

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34 Mo. 364; Hannibal & St. Joseph R. Co. v. Brown et al., 43 Mo. 294; Board etc. v. Frye, 192 Mo. l. c. 563, 91 S. W. 472. It is well to say here that on the authority of Lanyon v. Chesney, supra, appellants cannot rely upon the fact that there was nothing of substance to set aside after judgment was satisfied, because the principle is the same as in the Lanyon case, where restitution and damages were awarded on motion after the cause had been dismissed in vacation. The fact that most of the orders of restitution in the adjudicated cases have dealt with specific properties does not preclude that restitution may be made where the property obtained may soon lose its identity. The purpose of restitution is to restore to another that which has been in law wrongfully obtained or received.

Appellants contend that when the trial court set aside the judgment that its authority there ceased, and that no authority in law existed to go further, and cite State v. Wallace, 209 Mo. 358, 108 S. W. 542, to support this contention, but the Wallace case will not support that contention. In that case one Wallace was charged with grand larcency, and gave bond for his appearance. He did not appear according to the conditions in the bond, and forfeiture was taken, and *scire facias* issued against the sureties, and judgment was rendered against them. After several stays of execution the sureties filed a motion in the nature of a writ of error *coram nobis* suggesting to the court the death of Wallace at the time forfeiture and judgment were taken. Upon the hearing of this motion the court set aside the judgment against the sureties, and gave judgment in their favor and against the State. From this the State appealed, and the Supreme Court held that the trial court had no authority in that case to go further than to set aside the judgment against the sureties, and that the question of the death of the principal in the recognizance at the time judgment was rendered could be put in issue by answer to the *scire facias,* and the parties there were left exactly as they were before the judgment was rendered against

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the sureties. So in the instant case, with the judgment against the defendants set aside, the parties will be as they were before the trial upon the certificate or policy of insurance so far as the trial of that case is concerned. The trial court in the instant case when it set aside the judgment and ordered restitution did not attempt to render judgment in favor of defendants, and said cause is yet pending and undisposed of.

It clearly appears from Lanyon v. Chesney, and authorities cited supra, that the court had ample authority to order restitution so far as plaintiff is concerned. She was already a party to the record, and reasonable notice, which she had, was all that was necessary; but counsel say that even though the court had authority to order restitution as to plaintiff, that no authority exisfed to justify the court in ordering restitution as to them.

II.

Appellants, Hamlin, Collins & Hamlin, contend that they were not properly served with notice of the filing of the motion to set aside and for restitution. This notice which contained the substance of the motion or suggestions, was served upon W. W. Hamlin, one of the members of the firm of Hamlin, Collins & Hamlin on March 19, 1917, notifying them that the motion would be called up on March 24th. The motion was not passed upon until April 14th. Appellants sought to limit their appearance, and contended that the court was without jurisdiction under the law to vacate the judgment. It appears that at the hearing of the motion O. T. Hamlin appeared, but sought to limit his appearance for Mrs. Warren only. However, the record discloses stipulations set out in full supra to which he was a party. Counsel, O. T. Hamlin, had what is generally denominated in the profession as a contingent fee contract as above noted by which his fee was conditioned upon recovery. He had a lien (section 964, R. S. 1909) as between himself and client upon the

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cause of action, and the judgment for his fee. On the hearing of the motion to set aside and for restitution, an agreed statement of facts was submitted. Appellant, O. T. Hamlin, without *any reservation* participated in settling this agreed statement of facts, which in effect was the evidence which defendants would have offered on the hearing of their motion. This agreed statement of facts was also in effect appellant's (O. T. Hamlin's) answer. He thereby invited the court to pass judgment, which it could not do if it had no jurisdiction. Appellant had he desired to expeditiously get the facts before the trial court, and relieve defendants of the necessity of taking evidence to establish the facts set up in their motion and yet make no waiver as to his plea to the jurisdiction should have in some manner made that reservation in the agreed statement of facts. [State ex rel. v. Grimm, 239 Mo. l. c. 172, 143 S. W. 450.] In Newcomb v. Railroad, 182 Mo. l. c. 707, 81 S. W. 1069, the Supreme Court discussing a question of jurisdiction arising on a motion quash the sheriff's return said: "The defendant could have made a special appearance for the purpose, and moved to quash the return for the insufficiency appearing on its face, and if the court had overruled the motion the defendant could have preserved its exception and have withdrawn, and if the court had then proceeded to render judgment for the plaintiff the judgment would have been reversed on appeal. But a plea to the merits is a general appearance and after that the character of the return is immaterial. There is no injustice in requiring a party, in a matter of procedure, to make his election and abide by his choice. If the defendant was of the opinion that the return was not sufficient to bring it into court and had confidence in its own opinion, it could have remained away and let the plaintiff take his own course. That was a station in the progress of the case where the law requires a party to rely on his own judgment and take the risk of being sustained in the end; he may keep out if he chooses, but if he elects to come in and plead to the

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merits, he submits his person to the jurisdiction of the court, and will not be heard afterwards to say that he was not properly called into court." We think that in view of these facts the court was clothed with ample power and jurisdiction to render judgment for restitution against counsel as well as against plaintiff. [Turner v. Edmonston, 210 Mo. l. c. 421, 109 S. W. 33; Board etc. v. Frye, 192 Mo. 562, 91 S. W. 472; Hannibal & St. Joseph R. R. Co. v. Brown et al., 43 Mo. 294; Gott v. Powell, 41 Mo. 416.]

In Hannibal & St. Joseph R. R. Co. v. Brown et al., defendant Brown in a former case had secured judgment against the plaintiff railroad company for $105 and costs amounting to $39.15. Defendant in that suit, the railroad company appealed (but it seems that no supersedeas bond was given), and the Supreme Court reversed the judgment. But in the meantime one Lander, attorney for Brown, caused an execution to be issued, and under and by virtue thereof the lands of the railroad company were levied upon and sold, and Lander became the purchaser. The case was to set aside the sheriff's deed to Lander. The Supreme Court in the course of the opinion said: "When the judgment in the case of Brown v. The Hannibal & St. Joseph R. R. Co., was reversed in this court all of the proceedings had in pursuance of that judgment were vacated, and the defendant was entitled to be restored to the condition in which it stood previous to the judgment, and to restitution of everything that it had lost and which remained in the hands of the adverse party, his agents, attorneys, or privies. Lander was the attorney who gave direction to the whole matter; he was cognizant of all the facts, and therefore chargeable in the same *manner* as Brown himself." This was a separate action which is true in a great number of cases respecting the subject of restitution, but in Colburn v. Yantis, 176 Mo. l. c. 686, 75 S. W. 653, the principle is laid down and approved that where one party has been wronged by the erroneous judgment which is reversed on appeal, it is not necessary for the

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party seeking restitution to what he has lost to bring a separate action, but all the parties being in court, the court will right the wrong with all possible speed.

III.

We have disposed of all questions raised by appellants, except the one raising the point that defendants voluntarily paid the judgment, and cannot therefore recover it back after the judgment was vacated. Had defendants paid this judgment with *full knowledge of all the facts,* then that they could not have restitution would undoubtedly be true. [Ritchie v. Carter, 89 Mo. App. 290; Wolfe et al. v. Marshal et al., 52 Mo. 167; Teasdale v. Stoller, 133 Mo. 645; Sears v. Grand Lodge A. O. U. W., 163 N. Y. 374, 57 N. E. 618.]

Ritchie v. Carter, supra, is the case upon which appellants mainly rely as controlling on the question of voluntary payment. The facts in that case are much different from the facts in the present case. The facts there are about as follows: Mayer & Bro. had sued one Batterton on an account for necessaries furnished Batterton and his family; judgment was obtained, execution issued, and Mrs. Batterton's land was levied upon. She filed a bill in equity praying for an injunction to restrain the sale under said execution, and Ritchie signed her injunction bond. Afterwards this injunction suit was dismissed, and Simms, the marshal of the court, against whom the injunction suit was brought, filed a motion asking for damages on the injunction bond. This motion was sustained, and damages awarded in the sum of $268, $150 of which was Carter's fee as an attorney for Simms. Thereafter Mrs. Batterton by writ of error took the case to the Kansas City Court of Appeals and that court reversed the finding of the trial court awarding damages, and remanded the case for a new trial. Upon retrial judgment went in favor of Mrs. Batterton, but in the meantime while Mrs. Batterton's case was pending in the Kansas City Court of Appeals, her sureties on the

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injunction bond, Ritchie and Ritchie, paid the $268 damages awarded by the trial court. When the case was reversed and judgment finally given for Mrs. Batterton, all that had been paid as damages was returned except the $150; the suit of Ritchie v. Carter was to recover that amount. The circumstances under which Ritchie and Ritchie paid the damages awarded are: A constable was interested in the fees of the case and insisted that he must either be paid or that execution issue. The clerk informed Ritchie and Ritchie of the constable's demand, and without further ado they paid the $268, knowing that there was a chance that the judgment against them might be reversed, and they made this payment seemingly without protest or reluctance and with full knowledge of all the facts; but not so in the instant case. Defendants paid the judgment believing that Warren was dead, and did not know at the time of payment that he was not dead. The case here under consideration therefore is to be distinguished from Ritchie v. Carter on the principle that in this case defendants had no knowledge of Warren being alive at the time the payment was made. Counsel for appellants strongly urge upon us that the rule is laid down in Ritchie v. Carter that the payment of a judgment where no execution had been issued is voluntary, and cannot be recovered back, even though the judgment upon which payment was made was afterwards reversed. We do not agree that the case turned upon the issue of payment when no execution was issued. Judge BLAND speaking for the St. Louis Court of Appeals in that case says: "In this State the rule is that a payment of a judgment is voluntary, unless made to procure the release of the goods of the party making payment after seizure, or to prevent their seizure by an officer armed with the authority or apparent authority to seize them." As supporting this rule Wolfe et al. v. Marshal et al., 52 Mo. 167, and Teasdale v. Stoller, 133 Mo. 645, are cited. An examination of the Wolfe case discloses these

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facts: One Perkins was the owner of a steamboat, and by an instrument in writing sold to Wolfe the privileges of the bar on said boat. By suctom the owner of the boat boarded the bartenders. Afterwards Perkins sold the boat to defendant, Marshal. Some months after this sale Marshal demanded payment of Wolfe for the board of the bartenders. Marshal first demanded $400, and finally settlement was made by the payment of $250. Several years elapsed, and Wolfe brought suit to recover back what he had paid as board for his bartenders. No suit was filed, and the payment was made on a compromise upon the mere threat of suit, with full knowledge of all the circumstances. There the rule is laid down thus: "Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the *other party* is armed with apparent authority to seize upon either and the payment is made to prevent it. But where he can only be reached by a proceeding at law, he is bound *to make his defense in the first instance* (italics are ours) and he cannot postpone the litigation by paying the demand and afterwards suing to recover it back." It was held in Teasdale v. Stoller, supra, that money voluntarily paid to satisfy a judgment afterwards reversed cannot be recovered back where it appears that the original claim was a just one. Money paid voluntarily with full knowledge of all the facts and without any fraud having been practiced cannot be recovered back, because of ignorance as to legal liability. Judge BRACE speaking for the Supreme Court in Teasdale v. Stoller, supra, says: "There are cases in which a right of recovery has been maintained although the judgment was voluntarily paid. [Citing Scholley v. Halsey, 72 N. Y. 578.] In this latter class of cases it will be found that upon the facts the action was maintained upon the ground that although the payment was voluntary, yet defend-

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ant having received the money of the plaintiff to which in *ex aequo et bono* he was not entitled, the same was recoverable by writ of restitution or by action in assumpit for money had and received, but it is believed that no well-considered case can be found in which it has been held, where money has been voluntarily paid on account or in satisfaction of a judgment afterwards reversed, and the party to whom it was paid, in equity and good conscience, was entitled to the same, that it could be recovered back. To so hold would be entirely repugnant to the very principle upon which the action is founded. As was said in an early case by CHASE, C. J.: The plaintiff cannot recover unless the defendant's retaining the money is contrary to equity and right. The defendant may resort to any equitable or conscientious defense to repel the claim of the plaintiff and may show the justice of his original claim." According to the above, money paid voluntarily in satisfaction of a judgment afterwards reversed cannot be recovered back if in equity and good conscience the party receiving the money is entitled to it. Invoking the homely maxim: "It is a poor rule that won't work both ways," the converse of this proposition becomes also true; and the inevitable conclusion gives expression to another rule of elementary justice, to-wit; that money paid in satisfaction of a judgment afterwards vacated and the party to whom it was paid is in equity and good conscience not entitled thereto, such money so paid can be recovered back. It will be noted that neither the Ritchie case nor the two cases there relied upon deal with payments made after execution was issued, or after levy; or threat to levy, but those cases were concerning payments made with full knowledge of all the facts, and in one instance, the Wolfe case, payment was made when no suit had been filed, and in the other two there was no final judgment. The Teasdale case turned on the proposition that recovery could not be had irrespective of the payment being voluntary or involuntary, because

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in equity and good conscience the defendant was entitled to the money received. In Colburn v. Yantis, supra, l. c. 685, the principle is unmistakably and clearly endorsed that money can be recovered back where paid on a judgment afterwards vacated, although there has been no execution issued. There money had been paid on a judgment afterwards vacated. Judge MARSHAL speaking for the Supreme Court said: "However the mistake occurred, the fact is that the plaintiff asserted a right to collect the $826 from the defendants under the judgment, and threatened to enforce it by xz vbfwym and the defendants paid it."

It would appear a vain and useless thing to say that before defendants could involuntarily pay their judgment so as to bring themselves within the rule governing involuntary payments that they must suffer the additional expense incident to execution; and more unreasonable still would it be to require them to wait until an officer had threatened to seize or had actually seized their property. When the judgment is rendered and becomes final, the other party is then armed with the authority to enforce his judgment. In the instant case no one had authority to order execution except the plaintiff or her counsel. (Ritchie v. Carter, supra, Davis v. McCann, 143 Mo. 173, 44 S. W. 795), therefore defendants could not have required the clerk to issue an execution or the sheriff to levy; and neither plaintiff nor her counsel requested, or ordered an execution, but accepted settlement after final judgment, and we hold that such payment was not voluntary. The expression in Ritchie v. Carter, "To prevent their seizure by an officer armed with the authority or apparent authority to seize them" was said *arguendo,* and was not necessary to the determination of the issues there decided. The rule laid down in Wolfe v. Marshal and Colburn v. Yantis is clearly that where one *party* is armed with the authority or apparent authority to seize upon either the property or the person of the other party and the payment is made to prevent such seizure,

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and that afterwards such authority be vacated or annulled, that then and under such circumstances money so paid may be recovered back. Plaintiff Warren was armed with a judgment; an execution could have been had upon demand; and defendants paid, wholly ignorant that Warren was alive, and we hold that in these circumstances the payment was not voluntary, but was involuntary and may be recovered back. Appellants contend that defendants cannot have restitution until they return or offer to return the receipt given for the misplaced policy at the time payment was made. This receipt in the circumstances had no value, and is therefore of no consequence.

IV.

It will be noted that the stipulations or admissions of fact upon which the trial court acted in setting aside the judgment and ordering restitution, discloses that Mrs. Warren contracted with O. T. Hamlin, only, and that he individually received the proportionate share of the proceeds of the afterwards vacated judgment. With this showing of facts, we do not believe that the trial court was justified in rendering judgment of restitution against W. W. Hamlin and L. L. Collins, as neither had received any part of the proceeds of the vacated judgment, and had no contract with Mrs. Warren. As between them and O. T. Hamlin, they would be entitled to their proportion of the fee, were it retained by O. T. Hamlin, according to the terms of the contract of partnership, but that would not be any authority to render judgment of restitution against them. Nor would the fact that either or both W. W. Hamlin and L. L. Collins appeared as counsel for Mrs. Warren be sufficient to justify judgment against them. [Huttig etc. Co. v. Shirt Co., 140 Mo. App. 374, 124 S. W. 1094.] Order and judgment for restitution can be made only upon proof, and only against those connected with the record as a party

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who has received or as counsel who has received the proceeds or a portion of the proceeds of the vacated judgment. [Lanyon v. Chesney, supra, Railroad v. Brown, supra.]

It follows from the above and foregoing that the order and judgment of restitution against W. W. Hamlin and L. L. Collins be reversed; and the order setting aside the judgment against the defendants and the satisfaction thereof; and the judgment of restitution against plaintiff, M. T. Warren and her counsel O. T. Hamlin, be affirmed; and it is so ordered. *Farrington, J.*, concurs. *Sturgis, P. J.*, concurs in paragraph I, III, and IV. and dissents in paragraph II.

STATE OF MISSOURI, Respondent, v. J. J. CHILTON, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **CRIMINAL LAW: Appeal: Record: Requisites.** Revised Statutes 1909, sec. 2048, providing for the short form of appeal, is not wholly applicable to criminal case, and to perfect an appeal, one convicted of a misdemeanor must file a perfect transcript as required by sections 5308 and 5309, and a printed abstract is insufficient.

2. **BAIL: Appeal: Release on Bond.** One convicted of a misdemeanor who gives his appeal bond is entitled to his liberty on the bond.

3. **CRIMINAL LAW: Appeal: Record: Requisites.** A defendant in a criminal case on appeal need not file a certified copy of the judgment or sentence and the order granting the appeal, but should first prepare and file his bill of exceptions and then direct certification by the clerk of a complete transcript.

4. ———: ———: **Misdemeanor Cases.** Revised Statutes 1909, sec. 5313, as to appeals in felony cases, does not apply in misdemeanor cases in which the appeal is returnable as in a civil case under section 2047, making the appeal taken sixty days before the term returnable at the next term, and, if taken a shorter time before the next term, at the second term.

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5. ———: ———: **Record: Requisites.** There being no law prohibiting an appellant in a misdemeanor prosecution from filing a certified copy of the judgment and order granting appeal, he may do so, and may abstract the record, but the preparation of such a record does not relieve him of filing a complete long-form transcript.

Appeal from Carter County Circuit Court.—*Hon. E. P. Dorris,* Judge.

AFFIRMED.

L. O. Nieder for appellant.

BRADLEY, J.—The prosecuting attorney of Carter county filed before a justice of the peace an information against defendant charging him with disturbing the peace of an individual. Not content with the outcome before the justice, defendant appealed to the circuit court; and there, upon trial before the court and a jury, he was found guilty as charged and his punishment fixed at a fine of one dollar. From this defendant sought to appeal to this court.

At the threshold of the merits we are confronted with this condition: Appellant has undertaken to bring his cause to this court by what is generally designated the short form appeal under section 2048, Revised Statutes 1909, which is not wholly applicable to criminal cases. [State v. Conners, 258 Mo. 330, 167 S. W. 429; State v. McHenry, 188 S. W. (Mo.) 187; Golden City v. Hall, 68 Mo. App. 627; State v. Faith, 180 Mo. App. 484; 166 S. W. 649; State v. Jones, 198 S. W. (Mo. App.) 421.] Appellant was tried below on April 9, 1917, and on May 23d, there was filed in this court a certified copy of the proceedings an order granting appeal as designated by the clerk in his certificate. This certified copy shows the court, the term, the date, the judgment; and recites the fact that motions for a new trial, and in arrest were filed and overruled; and that appeal was granted, and bond taken and approved in

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open court. It does not recite that any bill of exceptions was ever filed, nor does it contain a copy of the information upon which defendant was tried. Appellant on October 9, 1917, filed in this court a printed abstract of the record, which shows nothing of the record proper except the information, and a recital that defendant was convicted below, fined one dollar, and appealed. Then follows in the printed abstract what is captioned "bill of exceptions," in which the evidence is set out in narrative form for the most part, and in the main such as a bill of exceptions is in a civil case. After the signature of the trial judge this appears: "Bill of exceptions filed July 26, 1917, W. J. Burrows, Circuit Clerk." This record would be sufficient under our rules in a civil case. [Walls v. Tinsley, 187 Mo. App. 462, 173 S. W. 19.] We are not inclined to let mere technicalities control; but when a statute commands, it is not technical to observe. To disregard it is usurpation and violative of official duty. In State v.Faith, supra, this court said: "A reading of sections 5308 and 5309, Revised Statutes 1909, providing for appeals in criminal cases shows that an appeal in a criminal case can only be brought to this court by a full transcript of the record, certified by the clerk of the trial court. We cannot, therefore, review this case and pass on the alleged errors on the printed abstract of the record."

In State v. Connors, supra, it is held that in order to perfect an appeal in a criminal case as required by section 2048, Revised Statutes 1909, it is necessary within one year (there the Supreme Court was speaking of a felony) to file in the office of the clerk of the appellate court a *perfect transcript* of the record and proceedings of the trial court *under* the *certificate* of the clerk. This clearly precludes the appellate court from considering as the record a printed abstract, because it lacks the verity imported by the certificate of the clerk, and it is not a complete or perfect transcript as required by the statute. [Sec. 5309.] In

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State v. McHenry, 188 S. W. (Mo.) 187, the Supreme Court of this State held it to be personally incumbent upon the accused when appellant in a criminal case, other than convictions which automatically suspend execution, within the time allowed for perfecting the appeal to file with the clerk of the appellate court a full transcript as provided by section 5309, supra. There the court said: "We held that the filing of a short form transcript is neither contemplated by statute nor permitted to be done in a criminal case," citing State v. Short, 250 Mo. 331, 157 S. W. 306. In State v. Pieski, 248 Mo. l. c. 718, 154 S. W. 747, the court said: "Upon the appellant in the case at bar, as upon a civil appellant, the statute placed the duty of causing to be filed in the office of the proper appellate court a perfect transcript. This duty of initiative is not placed on the clerk of the lower court, but it is saddled by statute upon the appellant, except in appeals in convictions for capital offenses, when such latter clerks acts of his own volition by statutory mandate. In other words, while the clerk is required to act, in acting he does so upon the request and at the direction of the appellant. Nor does section 2053, Revised Statutes 1909, when carefully read, militate against this view. Appellant must not only himself see that his transcript is transmitted to and filed in the office of the appellate court, but it is his duty to see that it is filed and entered on the docket in the proper manner." The appellant in a criminal case must walk in the footprints as above stated of a civil appellant in causing to be filed in the time allowed, in the office of the proper appellate court a perfect transcript of his record, and this cannot be done by filing a printed abstract thereof. We apprehend, though it is not our province to say, that since the Act of the 1917 (Laws 1917, p. 246) abolishing capital punishment in this State that there is now no appeal in a criminal case wherein the defendant would fall under the provisions of section 5308, and might therefore rely upon the clerk to see

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that this transcript was sent up in accordance with the provisions of that section. Under section 5294, Revised Statutes 1909, the trial court might make an order that the appeal would operate as a stay. When the appellant gives an appeal bond as in the instant case he is of course entitled to his liberty on the bond (Ex Parte McAnally, 199 Mo. 512, 97 S. W. 921), but there it is the bond that operates in the nature of a stay. A defendant in a criminal case appealing to this court need not file here as in a civil case a certified copy of the judgment or sentence and order granting the appeal in the first instance, but should first prepare and file his bill of exceptions, and then direct the clerk to certify up a complete transcript of the proceedings, which of course will include the record proper and a perfect copy of the bill of exceptions. It might be well to note here that section 5313, Revised Statutes 1909, which gives the defendant one year to perfect his appeal in a felony does not cover misdemeanor appeals, and therefore an appeal here in a criminal case is returnable as in a civil case. That is, if the appeal is taken sixty days before the next term of this court then the appeal is returnable to our next term, if taken less than sixty days before our next term, then the appeal is returnable to our second term thereafter. [Sec. 2047, R. S. 1909.] Since, however, the complete transcript to be filed here includes the bill of exceptions the granting of further time to file the bill of exceptions may postpone the return term of the appeal until after such bill is filed. There is no rule or law however prohibiting an appellant in a misdemeanor conviction from filing here a certified copy of the judgment and order granting the appeal as in a civil case, but if this be done it should be followed by a full transcript of the record proper and bill of exception certified by the clerk. Indeed the appellant may abstract the record if he desires, and file same with his printed brief, which frequently is done to particularly call the court's attention to matters which appellant considers most

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important, but it should not be overlooked that there must be filed here a complete transcript (long form) and this must be certified to by the clerk of the trial court. The purpose of the statute (section 5309, R. S. 1909) regulating appeals in criminal cases is to safeguard the rights of the accused to the end that there will be no short cuts taken to deprive him of his liberty or of his property; and to avoid the possibility of collusion which might affect his rights as an accused. But the accused must see that his appeal is in accordance with the law safeguarding it. On the other hand the State (the public) is a party in a criminal case, and lest there might be some short cut taken by the accused whereby the full record is not brought up, the Legislature has prescribed that the whole record shall be brought up to the end that all the evidence, and all the proceedings had in the trial court may be before the appellate court.

We have discussed appeals in criminal cases somewhat at length in the hope that hereafter appellants in criminal causes will not overlook the distinction between a short form civil appeal, and an appeal in a criminal case. We are not unmindful of the duty devolving upon this court, in criminal cases, transcript of the record having been filed, to examine the same for error, regardless of statements, briefs, etc. [Sec. 5312, R. S. 1909; State v. Faith, 180 Mo. App. l. c. 494, 166 S. W. 649; State v. Miles, 174 Mo. App. 181, 156 S. W. 578; State v. Jones, supra.] Responding to this duty we have carefully examined all of the record in this cause that is before us and find no error therein. It follows therefore that the judgment below should be affirmed; and it is so ordered. *Sturgis, P. J.*, and *Farrington, J.*, concur.

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GRANITE BITUMINOUS PAVING CO., Respondent, v. PARKVIEW REALTY & IMPROVEMENT COMPANY ET AL., Appellants.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **SPECIAL TAX BILLS: Mortgages and Deeds of Trust: Street Improvements: Priority of Lien.** A special tax bill for street improvements, though subsequent to a deed of trust in point of time, takes priority over the latter.

2. ———: ———: **Municipal Corporations: Contractor's Lien for Improvements: Enforcement: Limitation of Lien.** Section 25, article, 6, of the Charter of the city of St. Louis provides that a tax bill shall be come a lien upon the property charged therein and may be collected of the owner of the land and in the name of the contractor, as any other claim in any court of competent jurisdiction; by a subsequent provision of the same section it is declared that the lien of a tax bill shall be destroyed and of no effect against the land charged therewith unless proceedings shall have been commenced to collect the same within two years from the maturity of the bill and still be pending. *Held*, that the two year period prescribed after which the lien is to terminate is not a mere statute of repose to bar actions, but is a limit to the existence of the lien, and, therefore, unless the suit is instituted against the owner within that time, such lien expires and cannot be revived and enforced against the interests of the owner of the land.

3. ———: ———: ———: ———: **Parties Defendant.** In a suit to enforce a special tax bill under article 6, section 25, of the Charter of the city of St. Louis, the beneficiaries under a recorded deed of trust are owners within the charter provision, and are not concluded unless they are made parties to the suit.

4. ———: ———: ———: ———: **Right to Redeem: Day in Court.** In such suit a holder of a deed of trust of record, not notified when the lien matured, and not make a party to the suit until after expiration of the two-year period prescribed by article 6, section 25 of the Charter of the city of St. Louis, is not given his day in court by his right to redeem after judgment.

5. ———: **Evidence: Owners Not Named in Tax Bills: Proof of Allunde: Basis for Lien.** While general taxes in favor of the State (R. S. 1909, sec. 11385) are a continuing lien against the land no matter who is the owner nor in whose name assessed,

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yet in the sense of the said charter provisions, the beneficiaries in a deed of trust are regarded as owners of the property, and it is essential, when others than those named in the tax bill appear to be owners, that proof *aliunde* of the bill be made in order to affect the right of such owners not named therein.

6. ———: ———: **Right to Lien: Assertion Within Time Limit.** A special tax bill is not prima-facie evidence of the right of a lien against a mortgagee not named therein, and unless the lien is asserted while the right of the lien exists, and subsequently established, there is naught from which redemption should be made; otherwise upon foreclosure the land is not chargeable with the lien.

7. ———: **Tax Liens Distinguished: Right to Establish Lien: Optional.** In the case of special tax bills the lien obtains against the owners and their interests in the land only by virtue of its being established against their interests in the land by proof, and not because it comprehends such interest whether or no, as a matter of law, and there exists only a right to establish a lien which attaches provided competent proof is made against the owner while the right of the lien exists.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Eugene McQuillin,* Judge.

REVERSED.

Collins, Barker & Britton for appellant.

(1) When the Supreme Court on a proper transfer has jurisdiction of a cause, it will hear and determine the entire cause and not merely dispose of the point of difference in the Court of Appeals. Sutton v. Cole, 155 Mo. 206; Fulkerson v. Murdock, 123 Mo. 292. (2) The charter lien of a tax bill issued July 1, 1905, for work done under an ordinance enacted in February, 1903, and which could under no possible theory have become a lien prior to said February, 1903, has no priority over the lien of deeds of trust executed and recorded in 1902 and 1901. Art. 6, sec. 24, Charter, city of St. Louis; Parker Washington Company v. Corcoran, 150 Mo. App. 188; Cook Case, 101 Ind. 446; Aetna Case, 117 Ind. 251; Pierce Case, 131 Ind. 284; Lovelace Case,

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133 Ind. 600; Pittsburgh Appeal, 40 Pa. 457; Martin v. Greenwood, 27 Pa. Sup. 245-251; Seattle v. Hill, 14 Wash. 487, 489; O'Neil v. Duringer, 31 N. J. Eq. 510; 27 Cyc, 1176; Hamilton on Special Assessments, sec. 708; Elliott Roads and Streets, secs. 543, 547-599; Dissenting Opinion of Kennish, Judge, in Morey Engineering & C. Co. v. Ice Rink, 242 Mo. 241, and authorities cited; Dissenting Opinion of Walker, Judge, in Jaicks v. Oppenheimer, 175 S. W. 972, and authorities cited; Same case, 168 S. W. 216; Wood v. Brady, 68 Cal. 78; Wood v. Curran, 99 Cal. 137. (3) But, even if such priority were admitted, still, in a suit to foreclose the lien of a tax bill, it is necessary to make one whose interest in the land is sought to be subjected to such a lien, a party thereto, and this is unquestionably true where, as here, in the case of the *cestuis que trustent* in the deeds of trust, he is a record owner. If not made a party the judgment is as to him of no force or effect whatever, and as if never entered. Perkinson v. Meredith, 158 Mo. 464; Jaicks v. Sullivan, 128 Mo. 177; Paving Company v. Peck, 186 Mo. 520; Corrigan v. Bell, 73 Mo. 53; City v. Bernoudy, 43 Mo. 552; Newman v. City of St. Joseph, 126 Mo. 96; Allen v. McCabe, 93 Mo. 138; Williams v. Hudson, 93 Mo. 524; Stafford v. Fizer, 82 Mo. 393; Smith v. Barrett, 41 Mo. App. 460; Forrey v. Holmes, 65 Mo. App. 114; Eyermann v. Scollay, 16 Mo. App. 498; St. Joseph v. Baker, 86 Mo. App. 310, 113 Mo. App. 691; Olmstead v. Tarsney, 69 Mo. 396; Kirkwood v. Handlan, 182 Mo. App. 636; Utah Implement & Vehicle Co. v. Bowman, 209 Fed. 942; Page v. Chase Co., 145 Cal., 582; Wood v. Brady, 68 Cal 78; Wood v. Curran, 99 Cal. 137; Brady v. Burke, 90 Cal. 1; Lumber Co. v. Schafer, 251 Mo. 53. Nor is it sufficient, to charge the interest of a *cestui que trust* in a deed of trust, that the trustee be made a party. Perkinson v. Meredith, supra. Jaicks v. Sullivan, supra; Corrigan v. Bell, supra; St. Louis v. Bernoudy, supra; Williams v. Hudson, supra; Stafford v. Fizer, supra; Keating v. Craig, 73 Mo. 507; McLaren

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v. International Company, 126 Mo. App. 254. And other cases cited under Point 3, supra. (4) (a) The lien of any tax bill that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect same within that time and shall still be pending, shall be destroyed and of no effect against the land charged therewith. Art. 6, sec. 25, Charter of the city of St. Louis. (b) And where suit is commenced within that period against certain defendants and other defendants are brought in after the expiration of two years, no judgment can be rendered against the latter parties or their interest. Forrey v. Holmes, 65 Mo. App. (K. C.) 114; Jaicks v. Sullivan, 128 Mo. 177; Smith v. Barrett, 41 Mo. App. 460; St. Joseph ex rel. v. Baker, 113 Mo. App. (K. C.) 691; St. Joseph v. Baker, 86 Mo. App. 310; Eyermann v. Scollay, supra; Smith v. Boese, 39 Mo. App. 15; Badger L. C. v. Staley (Feb. 7, 1910, K. C. C. of A.), 125 S. W. 779, 141 A. 295; Lumber Co. v. Schofer, 251 Mo. 539; Parker Washington Company v. Kemper (May 9, 1910, K. C. C. of A.), 128 S. W. 271; Hiller v. Schulte, 184 Mo. App. 42; McLaren v. R. E. & I. Co., 126 Mo. App. 254; Utah I. & V. Co. v. Bowman, 209 Fed. 942; Construrtion Co. v. Greffet. 174 Mo. App. 188; Page v. Chase, 145 Cal. 582; Wood v. Brady, 68 Cal. 78; Wood v. Curran, 99 Cal. 137; Brady v. Burke, 90 Cal. 1. (5) The judgment bearing eight per cent. is in conflict with section 7189, R. S. 1909, and erroneous. Gilsonite Roofing and Paving Company v. St. Louis Fair Grounds Association (Mo. Sup. Nov. 12, 1910), 132 S. W. 657. (6) The judgment including therein interest on the several installments at eight per cent from August 19, 1905, to date of judgment was erroneous. The installments only draw six per cent. up to date of their maturities as fixed by the tax bill itself. The judgment, therefore, appears excessive from the face of the record. Eyermann v. Stevens (St. L. C. of A.), 170 S. W. 330. (7) The two tax bills, Nos. 3655 and 3648, sued on in cases Nos. 17593 and 17594 (Court of

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Appeals Nos. 12561 and 12562), issued against one lot are void. Barnetts Ex. v. Board of P. Schools, 61 Mo. App. 539-42 (Opinion by Rombauer); Bircher v. Bircher, 204 Mo. 562; Savings Bank v. Tracy, 141 Mo. 258-9.

Sturdevant & Sturdevant for respondent.

(1) Special assessments for local improvements in Missouri are referable to and sustainable under the taxing power of the State. Garrett v. St. Louis, 25 Mo. 505; Heman v. Allen, 156 Mo. 534; Barber Asphalt Co. v. French, 158 Mo. 534; Construction Co. v. Shovel Co., 211 Mo. 531; Construction Co. v. Railroad, 206 Mo. 179; Morrison v. Morey, 146 Mo. 543; Cooley on Taxation, 623. They are also sustainable under the police power. Morrison v. Morey, 146 Mo. 543. (2) The lien of general taxes, because of their purpose and nature, is superior to all pre-existing contract or judgment liens unless especially provided otherwise by statute. Osterberg v. Union Trust Co., 93 U. S. 428; Stafford v. Fizer, 82 Mo. 393; Jack v. Weiennett, 115 Ill. 105, 110; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138; Williams v. Hudson, 93 Mo. 524; Morey Engineering Co. v. Ice Rink, 242 Mo. 241. (3) Special taxes can only be created in the exercise of a governmental function. In this respect they are like general taxes. The lien of such taxes under the charter of St. Louis and the laws of Missouri generally, attaches to the subject of taxation, to the *res*, the estate itself, and the entire estate is bound regardless of the condition of the title. No form of incumbrance prior or subsequent, in the nature of contract or judgment liens, can prevent the exercise of the taxing power of the State over the subject and the whole subject. Keating v. Craig, 73 Mo. 507; Excelsior Springs v. Henry, 99 Mo. App. 450; Corrigan v. Bell, 73 Mo. 53; Wabash v. East Lake, 134 Ill. 384, 399; 10 L. R. A. 291; Dressman v. Bank, 100 Ky. 571, 573, et seq.; Osterberg v. Union Trust Co., 93 U. S. 424; Morey v. Duluth, 75 Minn. 221; Seattle v. Hill, 14 Washington, 487; 35 L. R. A. 372, and

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note; Pittsburg's Appeal, 70 Pa. St. 142; Allegheny Cities' Appeal, 41 Pa. St. 60; Ready v. Burke, 90 Cal. 1; Cooley on Taxation, 623; Charter v. City of St. Louis, article 6, secs. 14 and 25; Stafford v. Fizer, 82 Mo. 393; State v. Railroad, 77 Mo. 202, 220-221; Jaicks v. Sullivan, 128 Mo. 177; Perkinson v. Meredith, 158 Mo. 457, 464-465; Dresman v. Smirnia, 104 Ky. 693; O'Dea v. Witchell, 144 Cal. 382-383; Chase v. Trout, 146 Cal. 365; Tybaso v. Ft. Myers, 56 Fla. 817; Richmond v. Williams, 102 Va. 733; Norwich v. Hubbard, 22 Conn. 587; State v. Kilburn, 81 Conn. 9; Auditor General v. Bishop, 161 Mich. 122; Dale v. McEvers, 2 Cowen, (N. Y.) 118; Warner v. Van. Alstyne, 3 Paige (N. Y.) 513; Clifton v. Cincinnati, 6 Am. Law. Rec. (Ohio) 687; Morlein v. Westmeier, 4 Ohio, C. C. 299; Corporation of Birmingham, L. R. 17 Ch. D. 782. (4) Since the adoption of our Constitution in 1821, the Legislature has enacted many laws relative to both general and special taxes and in providing for the lien of such taxes it has with great uniformity provided, merely that such taxes should constitute a "lien," using the latter term without qualifying words either to enlarge or restrict its meaning. Our Supreme Court has a number of times held that the lien of the State for taxes takes precedence of and is superior to all other liens whether prior or subsequent, and has therefore determined the legislative intent to create a first lien by the use only of the word "lien" in reference to the effect of a tax lien. Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 475; Allen v. McCabe, 93 Mo. 144 and 145; Williams v. Hudson, 93 Mo. 529. The same effect has been given to the word "lien" by adjudication in this State relative to special taxes. Excelsior Springs v. Henry, 99 Mo. App. 450; Keating v. Craig, 73 Mo. 507; Perkinson v. Meredith, 158 Mo. 457. Other jurisdictions have adopted a like construction of statutes containing the same or similar terms relative to local taxation. If the legislative intent to give priority to special tax liens is apparent, it is not

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necessary that the statute should so provide in express terms. It is sufficient if the intention can be gathered from the general provisions and the purposes of the statute. Seattle v. Hill, 14 Wash. 487; Wabash, etc. v. Eastlake, etc., 134 Ill. 399; Storrie v. Houston St. Ry. Co., 92 Tex. 129. All statutory provisions on the general subject may be construed together for the purpose of gathering the legislative intent and a construction may be adopted consistent with the objects to be accomplished. Seattle v. Hill, 14 Wash. 487; Wabash, etc. v. Eastlake, etc., 134 Ill. 399; Storrie v. Houston St. Ry., 92 Tex. 129; Pattison v. O'Neill, 32 N. J. Eq. 386; Howell v. Essex County, etc., Id. 672. Assessments for local improvements are taxes and are within the legislative provision regarding the priority of tax liens. Howell v. Essex, etc., 32 N. J. Eq. 672; Seattle v. Hill, 14 Wash. 487; Storrie v. Houston St. Ry. Co., 92 Tex. 129. (5) Special taxes, like general taxes, are created in the exercise of the taxing power of the State, and in no other manner. The liens of special and general taxes upon land are identical as to the subject to which the lien attaches, and the scope and effect of the lien. In both instances the lien of the tax attaches to the land itself to the *res,* and binds all interests in the land and is superior to all. When the land taxed is subject to an existing mortgage, or other incumbrance resting upon contract, the lien of the tax supersedes such incumbrance and become senior thereto; and in such cases the lien of the junior lienholder is a lien only upon the equity of redemption of the owner of the land, which gives him the right to redeem and protect himself against the paramount lien of the tax. On the foreclosure of such tax lien the owner of the land is a necessary party to a valid judgment of foreclosure. The senior lien holder may likewise foreclose and bar the equity of redemption of a junior incumbrancer by making him a party, also, to the foreclosure; or if he elects, may waive the right to bar and foreclose such equity of redemption of the

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junior lienholder and omit him from the suit, in which event the latter may redeem from the purchaser under the foreclosure of the tax lien. And when the senior tax lien is so foreclosed and the land sold to satisfy such lien, the purchaser at such sale acquires a fee simple title to the land, subject only to the condition, that the junior lienholder not made a party may redeem from the sale. Keating v. Craig, 73 Mo. 507; Stafford v. Fizer, 82 Mo. 393; Paving Co. v. Realty Co., 168 Mo. App. 468. Gitchell v. Kreidler, 84 Mo. 472; Allen v. MacCabe, 93 Mo. 138; Land & Lumber Co. v. Bippins, 200 Mo. 688, l. c. 696-7; Morey Engineering & Const. Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241. (6) Junior lienholders are not necessary parties to a suit foreclosing the lien of a special tax bill. Valentine v. Havener, 20 Mo. 133; Talbott v. Roe, 171 Mo. 432; Jones on Mortgages (6 Ed.), par. 1395-6; Wiltse, Mortg. Foreclosure, pp. 190 and 191; also p. 191, par. 160 and authorities; Haines v. Beach, 3rd John Ch. 459; Tug. River Coal, etc. v. Brigel, 86 Fed. 818; Davis v. Mercantile Trust Co., 152 U. S. 590; Corrigan v. Bell, 73 Mo. 53; Allen v. McCabe, 93 Mo. 138; Williams v. Hudson, 93 Mo. 524; 27 Cyc. 1563 and notes; Page and Jones on taxation by assessment, secs. 1123-1225. (7) The right of a junior lienholder, who was not a party to the suit foreclosing a senior lien, is a right to redeem, *and that only;* and this is, of course, true as to all bondholders and beneficiaries for whose benefit the junior lien is held. Wiltse on Mortg. Foreclosure, pp. 190-191, par. 160; also authorities; Jones on Mortg., secs. 1203, 1396 and 1426; Stafford v. Fizer, 82 Mo. 393; Rothenberger v. Garrett, 224 Mo. 197; Williams v. Hudson, 93 Mo. 524; Allen v. McCabe, 93 Mo. 138; Keating v. Craig, 73 Mo. 509. (8) Under the charter of St. Louis and adjudications thereon the owner of the property to which the lien of the tax bill attaches is a necessary party, that is, a wholly indispensable party to a suit foreclosing such lien, and unless such owner is a party to the suit any judgment therein establishing a

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lien is void. Barnett, etc. v. Board of St. Louis Public Schools, 61 Mo. App. 542; Perkinson v. Meredith, 158 Mo. 457; City of St. Louis, etc. v. Bernoudy, 43 Mo. 552; Jaicks v. Sullivan, 128 Mo. 177. (9) On the other hand it is equally well settled by adjudication that the beneficiary in a deed of trust, or mortgage, is not a necessary party to a suit foreclosing the lien of a special tax bill. Upon this it follows that such trustee or mortgagee is, therefore, not an owner within the meaning and purpose of that term as used in our city charter and the law making owners necessary parties to such foreclosure. City of St. Louis, etc. v. Bernoudy, 43 Mo. 552; Olmstead v. Tarsney, 69 Mo. 396; Keating v. Craig, 73 Mo. 507; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138. (10) Where the amount assessed against a tract of ground is correct the tax bills issued thereon are not void because two bills are issued, when the entire assessment on the particular tract might have been included in one bill. If the amount of the tax is correct the owner suffers no injury by reason of the two bills. Whittemore v. Sills, 76 Mo. App. 257. (11) Where the judgment rendered is for the correct amount of principal and interest due at the time of its rendition, the fact that such judgment provides that it shall bear a higher rate of interest than the law permits from the date of its rendition is not such an error as would justify reversal. The excessive interest so provided for can be remitted by plaintiff or corrected by the court and the judgment affirmed for the correct rate of interest. 3 Cyc. 434 and authorities under notes 21 and 22; State v. Hope, 121 Mo. 34; Kimes v. St. Louis, etc., 85 Mo. 611; Franklin v. Haynes, 119 Mo. 566. (12) "It is a maximum of judicial procedure, that where two conclusions are equally admissible, in construing a law, the one should be adopted by the court which will best carry out the object which the lawgivers sought to reach. The term "owner," in its restricted sense, means the legal owner, and, in its wider sense, any person beneficially interested in the property. The city charter in providing for the pay of

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the contractor in special taxbills, must have used the term "owner" in its more restricted sense, since, otherwise, the lien of the special taxbills in preference to existing liens created by deed, would have become practically unenforceable and furnished the contractor no security whatever. Of this, the facts disclosed by the record in this case furnish the fairest illustration." Rombauer, Paving Company v. Realty Company, 168 Mo. App. 480. The authority of the city of St. Louis to make public improvements of the class with which we are concerned here is found in Article 6 of the city charter. The particular provisions of the charter to which we will have occasion to refer later, applicable to street improvements, are found in sections 14, 25 and 26 of said Article 6. These sections provide, among other things, for the levying of the tax upon the land within a given district, assessing such tax against the land exclusively and not against its owner, for the lien and effect of the tax so levied and the procedure for the foreclosure of such lien and the exemption of the city from any liability for the cost of the improvement.

Charles W. Bates Amicus Curiae.

ALLEN, J.—The appeal in this case was first submitted to this court at its October Term, 1912, and was here disposed of by the opinion of Honorable R. E. ROMBAUER, special judge, which was adopted as the opinion of the court. NORTONI, J., however, dissented, in an opinion filed, and at his request the cause was certified to the Supreme Court (Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co., et al., 168 Mo. App. 468, et seq 151 S. W. 479). When the cause came on for hearing in the Supreme Court, *in banc,* at its April Term, 1917, that court, by its majority opinion, held that inasmuch as the record of this court in the case showed that a motion for rehearing had been sustained, without a rehearing having been had, or resubmission of the cause, the judgment of this court entered therein was *coram non judice* and

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void: and that since the cause had not been finally determined by this court, the Supreme Court was without jurisdiction to proceed with it. It was accordingly remanded to this court.

A rehearing has now been had before us, and the issue presented has been submitted for our determination. In the dissenting opinion of NORTONI, J., written when the case was formerly here (168 Mo. App. 483, et seq.), the facts are fully and separately stated, and we quote therefrom as follows:

"This is a suit on a special tax bill issued in accordance with the charter provisions of the city of St. Louis, in compensation for street improvement. Plaintiff prevailed in the suit, and the court gave judgment establishing the lien of the tax bill against the lot of defendant Nina Realty Company in the amount of $1600.23, and interest thereon.

"There are several defendants, and all of them appeal from this judgment, but the Nina Realty Company alone, as owner of the lot on which the lien is enforced, is the substantial party in interest. The other defendants are prior owners of the property and trustees in certain deeds of trust thereon, and it will be unnecessary to set them forth here, as they are without any beneficial interest in the property and the judgment is in no sense a personal one against them. At the time the judgment was entered, the lot on which the lien of the tax bill is sought to be established was owned by defendant Nina Realty Company, who suceeded to the title of the Parkview Realty & Improvement Company by virtue of the foreclosure of certain deeds of trust thereon, under which the Nina Realty Company purchased.

"The lot of ground involved is parcel of City Block No. 3878, fronting 405.17 feet on Union boulevard in the city of St. Louis. Plaintiff contractor reconstructed Union boulevard adjacent thereto, in accordance with an ordinance of and under a contract with the city of St. Louis, to that end. At the time of the

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improvement and the issue of the tax bill therefor, the lot was owned by the Parkview Realty & Improvement Company, a corporation, subject, however, to two deeds of trust then outstanding thereon. The first of these deeds of trust was executed on July 1, 1902 by the Parkview Realty & Improvement Company, owner, to the Lincoln Trust Company, trustee, to secure certain bonds. The second of such deeds of trust was executed on August 1, 1902 to the Lincoln Trust Company, trustee, to secure certain other bonds, and both of such deeds were duly recorded about the time of their execution. While these deeds of trust were in force and the indebtedness evinced by the bonds therein described was subsisting and unpaid, the city provided by ordinance for the reconstruction of Union boulevard. This ordinance appears to have been passed in February, 1903, and the contract for such reconstruction work was duly let thereunder to plaintiff. Plaintiff performed the work in accordance with the ordinance and contract, and on July 1, 1905 the tax bill sued on was issued to him therefor. Thereafter, on July 19, 1905, notice of the issuance of the tax bill was duly served by the city marshal on the defendant Parkview Realty & Improvement Company, owner of the fee, but on no other defendant. As originally issued, the tax bill was payable in installments, but upon the failure of the owner of the property to pay the first installment when due, plaintiff exercised its option under the city charter and declared all installments thereof due and payable. Under the provisions of the charter, the first installment of the tax bill became due thirty days after notice thereof was served on the owner—that is, on August 19, 1905—and subsequent installments became due immediately, likewise, because of the owner's failure to pay the first installment. Thereafter, on June 20, 1907, and within two years from the maturity of the tax bill August 19, 1905, plaintiff instituted this suit, to the end of establishing and enforcing the lien thereof against defendant Parkview Realty & Improvement Company,

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owner, and the trustee in the two deeds of trust, but omitted to make the beneficiaries in such deeds of trust parties thereto. Subsequently and after the expiration or more than two years from maturity of the tax bill, the property was sold at trustee's sale under the two deeds of trust above mentioned, and the Nina Realty Company became the purchaser thereof. Such sales under the two deeds of trust were had on November 2, 1908, and it was on that day the Nina Realty Company succeeded to the title of the prior owner, Parkview Realty & Improvement Company, through its purchase at the trustee's sale. The Nina Realty Company, having thus become owner of the fee during the pendency of the suit, was made a party defendant thereto on November 20, 1908. By filing an amended petition on that date, plaintiff set forth the trustee's sales and the fact that the Nina Realty Company had purchased the lot thereunder, made that company a defendant, and prayed that its interests as owner of the property should be subject to the lien of the tax bill in suit.

Among other things, section 25, Art. 6, of the city charter provides the lien of any tax bill that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect the same within that time and shall still be pending, shall be destroyed and of no effect against the land charged therewith. In view of this provision of the charter, the defendant Nina Realty Company interposed its answer to the effect that the lien of the tax bill had expired and was unenforceable against its interests in the property, for the reason that no suit had been instituted thereon within two years after maturity of the bill against the beneficiaries in the deed of trust under which it purchased. Though the Parkview Realty & Improvement Company, owner at the time, was sued within the two-year period, the case concedes that the beneficiaries in the two deeds of trust under which defendant Nina Realty Company purchased were not made parties thereto at the time. Indeed, the first move made

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toward bringing the interests of the beneficiaries before the court was the amended petition filed on November 20, 1908, adding the Nina Realty Company, who succeeded to their rights, as a defendant, and this was long after the expiration of the two-year period prescribed in the charter, for that period commenced to run when the tax bill matured, on August 19, 1905, and terminated August 19, 1907. Notwithstanding all of this, the court gave judgment for plaintiff, establishing and enforcing the lien of the tax bill against the lot of ground described and interests of both the Parkview Realty & Improvement Company and the Nina Realty Company therein, as though it were unnecessary to include the beneficiaries in the deeds of trust in a suit for the enforcement of the tax bill within the two-year period prescribed, to charge them or their successors as owners of the property with the consequences of the lien."

There is but one question now in the case, which was the only question before this court for determination when the former opinions were written; the Supreme Court in Morey Engineering Co., etc., v. St. Louis Artificial Ice Co., 242 Mo. 241, 146 S. W. 1142. having held that a special tax bill, though subsequent to a deed of trust in point of time, takes priority over the latter. The sole question for determination is whether or not the special tax bill may be enforced against the interest of the Nina Realty Company in the land, that company not having been made a party defendant within two years after the maturity of the bill. As to this question we have fully and carefully considered the able briefs and arguments of counsel *pro* and *con,* and have reached the conclusion that the dissenting opinion of NORTONI, J., supra, is a correct exposition of the law pertinent to the matter in hand. We therefore adopt it as follows:

"Obviously, error lies in this judgment, for it involves and affirms the idea that one's rights may be concluded as though a valid claim existed against him

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or his property without having this day in court until long after such claim had become extinguished of its own force. By section 25, article VI of the charter, it is provided the tax bill shall become a lien upon the property charged therein and may be collected of the owner of the land and in the name of and by the contractor, as any other claim, in any court of competent jurisdiction. From this, it appears that the lien is to be enforced against the land in the name of the owner thereof and, by subsequent provision of the same section, the lien of the tax bill, it is declared, 'shall be destroyed and of no effect against the land charged therewith,' unless proceedings shall have been commenced to collect the same within two pears from the maturity of the bill and still be pending. Therefore, the proceedings must be commenced on the tax bill and against the owner of the land within such two-year period in order to preserve and establish the lien, or, otherwise, it is destroyed and extinguished perforce of the very words that gave it life. The authorities are abundant and of one accord to the effect that the suit must be instituted against the owner within the two-year period prescribed, as will appear by reference to the following cases: The case of Eyermann v. Scollay, 16 Mo. App. 498, declares and affirms the rule under the St. Louis charter; and the following are to the same effect with respect to the charter of Kansas City; Smith v. Barrett, 41 Mo. App. 460; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890; Smith v. Boese, 39 Mo. App. 15; Forrey v. Holmes, 65 Mo. App. 114; Parker-Washington v. Kemper, 143 Mo. App. 244, 128 S. W. 271. For rulings to the same effect under the St. Joseph charter, see St. Joseph v. Baker, 86 Mo. App. 310; St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. The doctrine declared by all of the cases is, that the two-year period prescribed after which the lien is to terminate, is not a mere statute of repose to bar actions, but is rather a limit to the existence of the lien and, therefore, unless the suit is instituted against the owner

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within that time, such lien expires and it may not be revived and enforced against the interests of the owner in the land. [Smith v. Barrett, 41 Mo. App. 460.]

"But it is said, though such be true, the present suit was instituted against the Parkview Realty & Improvement Company, owner, within the two-year period, and that will suffice to establish the lien against the derivative title of the Nina Realty Company, though the beneficiaries in the deeds of trust were not made parties; for, it is said, such beneficiaries possess nothing more, as against this plaintiff lienor, than the right to redeem therefrom. There can be no doubt that the lien of a subsequent special tax bill duly established prevails over the lien of a prior mortgage or deed of trust and becomes senior thereto. Such is the effect of the recent decision of the Supreme Court in Morey Engineering, etc., Co. v. St. Louis Artificial Ice, etc., Co., 242 Mo. 241, 146 S. W. 1142. This is undoubtedly the rule where both the owner of the land and the beneficiaries in the mortgage are made parties to the suit prior to the expiration of the lien, for, in the case last above cited, all parties in interest were before the court. See, also, to the same effect, Keating v. Craig, 73 Mo. 507, where both the owner and the mortgagee were parties to the suit to enforce the lien of the tax bill. But though it be the rule that the lien of the subsequent tax bill becomes senior to the lien of the prior mortgage which is remitted to the position of a junior lien, when all parties in interest are before the court, it is the rule, too, that the rights of the beneficiaries in the mortgage are not concluded by the judgment unless they are made parties to the suit. For a judgment to this effect on a tax bill, see Forrey, v. Holmes, 65 Mo. App., 114. As to such beneficiaries who have been omitted from the suit to foreclose the State's lien for taxes, the Supreme Court has, in a number of cases, affirmed that, though title passed by the execution sale, their right to redeem was still available, as will appear by reference to Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kriedler, 84

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Mo. 472; Corrigan v. Bell, 73 Mo. 53; Allen v. McCabe, 93 Mo. 138, 6 S. W. 62.

"Considering the thought reflected throughout all of these authorities, it is obvious that the beneficiary in the deed of trust or mortgage is required to be made a party to the suit, for the reason that he is an owner, within the sense of that term as employed in the charter provision and as employed in the statute with respect to general taxes levied in behalf of the state. Some of the cases put the rule expressly on the ground that the beneficiary is an owner. [See Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472.] Furthermore, the Supreme Court, in the recent case of Morey Engineering, etc., Co. v. St. Louis Artificial Ice, etc., Co., 242 Mo. 241, 146 S. W. 1142, in construing the St. Louis charter, declared the beneficiary in the deed of trust an owner within the sense of that term, to the end of raising the lien of the tax bill from the position of the junior, where it otherwise lay, to that of senior lien over a mortgage prior thereto in point of time. To the end of evincing that the charter contemplated the lien of the tax bill should prevail over the rights of a prior mortgage, the Supreme Court quoted from section 25 of the charter as follows; 'Said tax bills shall be and become a lien upon the property charged therewith, and may be collected of the owner of the land and in the name of and by the contractor as any other claim in any court of competent jurisdiction.' Touching the words thus quoted, the court says, 'Construed in the light of the case last cited, this means that the tax is a lien upon the property, to be enforced by a proceeding *in rem* against the property. And, as ruled above, the word 'owner' includes incumbrances.' If, then, the beneficiary in the deed of trust is to be regarded as an owner of the property for the purpose of postponing the lien of his prior mortgage to the lien of the subsequent tax bill, it would seem that he should be regarded as an owner in whose favor the requirement to institute suit within the two-year period, in order to preserve the liens, ob-

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tains. On a like question the Kansas City Court of Appeals, under the charter of that city, declared that, unless the beneficiary in the mortgage was made a party to the suit within the two-year period, the lien as to his interests amounted to naught, or, in other words, had expired. [See Forrey v. Holmes, 65 Mo. App. 114.]

"But it is argued that the junior lienor is never a necessary party to a proceeding for the enforcement of the senior lien and that a valid judgment may be had against the *res*, enforcing the lien, though the junior lienor is not a party, but subject, however, to his right to redeem. The argument is obviously sound in those cases where the lien is a continuing one and so comprehensive by the terms of the statutes as to include all interest in the land in whosoever name it may be. The cases of Stafford v. Fizer, 82 Mo. 393; Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138, 6 S. W. 62, and numerous other authorities declare the rule where the lien of the State for taxes has been enforced. In the argument advancing this proposition it is said the junior lienor, the holder of the mortgage here, at best has a lien only on the equity of redemption, or a right to redeem from the prior lien of the tax bill, and that this continues and may be availed of to the very day of sale under the tax judgment; that though defendant Nina Realty Company was not made a party until after the two years had expired, and the beneficiaries in the mortgages, to whose rights it succeeded, were never made parties at all, its right to redeem is still open and this defendant has been given its day in court with respect thereto, for it may redeem even after the judgment is affirmed and at any time before the property is sold in execution thereunder. Obviously this argument assumes a subsisting lien against the interests of the Nina Realty Company from which a redemption may be made. If the lien continued to exist as in the tax cases, and obtained upon the realty without regard to the ownership, the argument would be persuasive, indeed. But here, the lien of the

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tax bill expired before it was ever asserted, as the charter requires, against the beneficiaries in the mortgages or the Nina Realty Company, which succeeded to their rights, and, furthermore, the lien of the tax bill does not obtain against the land without regard to the ownership.

"The general taxes in favor of the State are declared by section 11385, Revised Statutes 1909, to obtain against the land 'no matter who is the owner nor in whose name it was assessed.' And the lien with respect to such taxes obtains accordingly there—that is, on every interest in the land. It is true that the owner of the land must be made a party to the tax suit for the purpose of enforcing the lien of the State, to the end of conferring the jurisdiction over the *res*, but the tax itself is affixed against the land as a matter of law without regard to the owner thereof. Such is not true as to a tax bill representing special assessments as for benefits because of improvements made, for unless the improvements are made, no tax can obtain, and that such improvements were made is a fact to be proved as a basis for the lien. Special tax bills become a lien upon the property and may be collected of the owner of the land, it is true; but, to this end, proof is required against the interest of the owner as a condition precedent to affixing the lien upon his interest in the land. This proof, according to section 25 of the charger, may be made by the tax bill itself, which is sufficient prima-facie evidence 'of the liability of the person therein named as the owner of the land charged with such bill to pay the same.' The tax bill here involved names the Parkview Realty & Improvement Company as the owner of the land and in no way refers to the beneficiaries in the mortgages. Obviously, then, the bill itself is sufficient to evince the right of a lien against only the Parkview Realty & Improvement Company. In the sense of the charter, as before pointed out, the beneficiaries in the mortgages are regarded as owners of the property, too, and it is essential, when others than

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those named in the tax bill appear to be owners, that proof *aliunde* the bill be made, in order to affect the rights of such owners not named therein. [See Farrell v. Rammelkamp, 64 Mo. App. 425; McCormick v. Clopton, 150 Mo. App. 129, 130 S. W. 122.]

"That the tax bill is not prima-facie evidence of the right to the lien against a mortgagee not named therein has been expressly decided, as will appear by reference to Kansas City to the use, etc. v. American Surety Co., 71 Mo. App. 315. Obviously the charter intends that every person interested as owner in the property sought to be subjected to the lien of the tax bill shall have a right to defend against the assertion of such lien, and most assuredly the assertion of the lien should be made while the right to it continues to exist and not after it dies, for then defense would be unnecessary. From these considerations alone, it would seem that the rule which prevails as to the right of the junior incumbrancer to redeem from the general tax lien and, except for that, a judgment to which he is not a party concludes him, is without force here, for unless this lien is established by evidence *aliunde* the tax bill, no lien whatever obtains against the rights of such owner as the Nina Realty Company, whereas in the case of the lien for general taxes it comprehends the whole estate and every interest in the land, without regard to the matter of ownership whatever and obtains against both prior and subsequent incumbrancers at all hazards. In the case of the special tax bill, the lien obtains against the owners and their interests in the land only by virtue of its being established against their interest in the land by proof, and not because it comprehends such interests whether or no, as a matter of law. Unless the lien is asserted within the two-year period and subsequently established, there is naught from which redemption should be made.

"It seems to me the opinion of the court in this case overlooks the fact that there is no lien here until established, and treats the matter as though there were

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a subsisting lien as in the case of general taxes or in the case of a mortgage, both of which liens obtain without any proof whatever. In this case, instead of there being a lien upon the land, there exists only a right to establish a lien which attaches provided competent proof is made against the owner within two years. If the mortgagee is an owner, as declared in Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. 1142, then such mortgagee should be sued within the two years limitation prescribed by the charter in favor of an owner."

To the foregoing we desire merely to add the following observations:

Though we have great respect for the views of the learned special judge, formerly a member of this court, who wrote the majority opinion when the case was previously here, it is our judgment, upon mature reflection, that that opinion fails to follow the ruling of the Supreme Court in the Morey case, supra, in holding that the word "owner," as used in the (then) charter of the city of St. Louis, was to be taken as used in its restricted sense, meaning only the legal owner, and that it did not include any other person beneficially interested in the property. In the Morey case the Supreme Court appears to have distinctly held to the contrary, viz., that the word "owner" in the charter is to be taken in its broad sense, and that it includes a *cestui que trust* in a deed of trust, or other holder of an incumbrance on the land. This appears more than once throughout the majority opinion in that case; and finally it is said (l. c. 259): "And, as ruled above, the word 'owner' includes encumbrancers."

We may also remark that what was said in the former majority opinion of this court herein, respecting the difficulties attendant upon the enforcement of a special tax bill if the word "owner" in the charter is to be taken other than in its restricted sense, supra, appears to wholly fail to reckon with the fact that our statute, section 1776, Revised Statutes 1909, makes express

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provision for service on unknown parties by publication in an action of this character.

We are much strengthened in our view of the case, supra, by the recent decision of our Supreme Court in Riverside Lumber Co. v. Schafer, 251 Mo. 539, 158 S. W. 340, decided while the case now before us was pending in the Supreme Court on certification as stated above. That was a suit to enjoin the sale of real property under "a school fund mortgage." The plaintiff therein, the Riverside Lumber Company, had filed a mechanic's lien against the property, and since the lien dated from the commencement of the work on the building, or the furnishing of the materials therefor, which was prior to the execution and recording of the mortgage, the former was entitled to priority in law over the latter. The plaintiff, however, had failed to make the mortgagee a party to the suit to establish the mechanic's lien, within ninety days from the filing of the lien account. It was held that by the failure to make the mortgagee a party within ninety days the priority of the mechanic's lien over the school mortgage was lost; and that the judgment establishing the lien in no wise affected the interest of the mortgage. In the course of the opinion the learned author thereof said:

"And it has also been held that if the owner of the property, for any reason, is not made a party to the suit, within said ninety days, no lien can be established against his interest therein. That being true, then by parity of reasoning, I am unable to see how it can be logically said that the interest of any other person in the property can be tried and adjudicated, if the suit is not begun against him within said ninety days. I can see no reason for differentiating the interest of the landowner and that of the mortgagee in proceedings to enforce mechanic's liens against the property in which both are interested.." [See Riverside Lumber Co. v. Schafer, supra, l. c. 551, 552].

It is argued that the Riverside Lumber Company case does not here apply, for the reason that it was

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one involving a mechanic's lien, while we are here concerned with the lien of a special tax bill. It is unnecessary to set out at length the argument advanced in this connection. So far as concerns the particular question before us the principle involved is, in our judgment, precisely the same whether the proceeding be one to enforce a mechanic's lien or a special tax bill. In either case the lien (whatever may be its precise character up to that time) ceases to have any existence after the lapse of a certain period of time, unless proceedings are instituted to establish or enforce it. In this respect both tax bills and mechanic's liens differ from mortgages and deeds of trust which create liens without the aid of any suit to establish or enforce them, and which continue as liens until satisfied or until the holder has lost his right by limitation. In the case either of a tax bill or a mechanic's lien it is purely optional with the holder to take steps within the requisite time, to impose the lien against the interest of all parties in the land, or to proceed alone against the interest of the holder of the equity of redemption waiving his right to bring in parties otherwise beneficially interested in the property. In this connection see Riverside Lumber C. v. Schafer, supra, l. c. 552.

It is true that as to mechanic's liens the statute provides that all parties interested in the property may be made parties "but such as are not made parties shall not be bound by any such proceedings;" but this is the effect of the provisions of the charter of the city of St. Louis then in force (See Perkinson v. Meredith, 158 Mo. 457, l. c. 464, 59 S. W. 1099), and is merely in accord with the fundamental principle that the interest of one in land cannot be divested by a proceeding of which he has neither actual nor constructive notice.

And there are pointed reasons, we think, why a *cestui que trust* in a deed of trust should be made a party, within the time which by law constitutes the

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period of the existence of the lien, if his interest is to be affected by the proceeding. He has more than a mere right to redeem against the tax bill. He is entitled, in our view, to question the validity of the tax bill, or the proceedings leading up thereto, or the amount thereof, and to be accorded the right to do so while the evidence touching the matter is available and fresh. The *cestui que trust* may be, and often is, more vitally interested in asserting such defenses than the owner of the naked legal title whose equity of redemption may perhaps be worthless. In the recent case of Utah Implement-Vehicle Co. v. Bowman, 209 Fed. 942, a case involving the question decided in the Riverside Lumber Company case, supra, and which is in line with the latter case, it is said:

"Any dispute touching the amount of the claim, the date of its origin or the time to which the lien relates, is thus to be conclusively settled while the facts are still fresh and the witnesses are available. Now it cannot be doubted that it is often quite as important to an incumbrancer, who is a stranger to the transactions upon which the claim of the lien is based, to have the benefit of this protection, as to the owner himself, who is in a better position to know the facts and to preserve the evidence thereof. . . .

"The argument that the limitation does not apply to a mortgage, because the validity and amount of mechanic's lien may be established in a suit between the claimant and the owner of the property alone, and that the only issue in which the mortgagee is interested, namely, the date or relative dignity of the lien, may be tried out in a subsequent suit to redeem in so far as it has any force at all, rests upon an erroneous assumption, which is that the mortgagee has no right to question the amount or validity of the claim of lien. These are issues which the incumbrancer, equally with the owner, may raise, and for that purpose the mortgagee is entitled to his day in court. If, for instance, a lien were asserted for the value of materials which

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was never furnished for use in a structure covered by the mortgage, it must be clear that the mortgagee may, by showing the fact, defeat the lien or reduce the amount thereof."

This reasoning, we think, is equally applicable to the situation presented by the record before us.

From the views expressed above it follows that the interest of the *cestui que trustent,* who were never made parties remained unaffected by the proceeding herein. That interest has now passed to the Nina Realty Company, which corporation has acquired the fee simple title to the land through the foreclosure of the deed of trust. That defendant was not made a party to the suit until more than two years after the maturity of the tax bill, and hence the land in its hands is not chargeable with the lien thereof.

The judgment must accordingly be reversed, and it is so ordered. *Becker, J.,* concurs. *Reynolds, P. J.,* concurs in the result, on the authority of the decision of the Supreme Court in Riverside Lumber Company v. Schafer, supra, a decision not before us when the former opinion was written.

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CASES DETERMINED

BY THE

ST. LOUIS KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1918.

GRACE ATKINSON, Respondent, v. AMERICAN SCHOOL of OSTEOPATHY, and CHARLES E. STILL, Appellants.

St. Louis Court of Appeals. Option Filed March 5, 1918.

1. **PHYSICIANS AND SURGEONS: Malpractice: Evidence: Statements of Agent: Admissibility Against Principal.** In an action against a school of osteopathy and a member of its faculty, who, it is alleged, while treating plaintiff, negligently broke her sternum, it not being controverted that such member treated plaintiff as the agent and employee of the school, what was said either by the president or dean of the faculty of the school, while making a diagnosis of plaintiff, at the request of such defendant member, with reference to what they or either of them found to be the *then* condition of plaintiff's sternum, ribs, etc., is admissible; such statements being made in the scope of their duty and while in the actual performance thereof.

2. ———: ———: ———: **Admissions of Codefendant.** Statements of a codefendant, while treating plaintiff a day or two after the injury, to the effect that he was the "cause of all this suffering," is admissible against him.

3. **TRIAL PRACTICE: Instructions: Failure to Request.** Where the court, in overruling an objection of defendant to admissions of its codefendant, admissible as to him, stated specifically that the statement was admissible only against the latter, the court did

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not commit prejudicial error in not instructing the jury, of its own motion, that such statements could be considered by them as affecting the latter defendant alone; counsel for defendant school having made no request for such instruction.

4. **EVIDENCE: Admission of Codefendant.** In an action against a school of osteopathy and a member of its faculty, who, it is alleged negligently broke plaintiff's sternum, the court properly permitted plaintiff to relate a conversation to the effect that, when she charged defendant member with responsibility for her injuries, the accusation was not denied by him.

5. ———: **Hypothetical Questions: Evidence to Support.** Every party has the right to place before the jury the scientific inferences properly deducible from such facts as the evidence tends to prove, subject to the contingency that the jury shall find such facts to be as claimed.

6. ———: ———: ———: **Expert Witnesses.** Counsel may put to an expert, after his competency has been established, a question in which the things which the evidence adduced tends to prove, and which counsel claims to have proved, are stated as a hypothesis, and the witness is asked to explain the conclusions which in his opinion result.

7. ———: **Witnesses: Experts: Cross-Examination: Reading from Books.** In an action against a school of osteopathy and a member of its faculty, who it is alleged negligently broke plaintiff's sternum while giving her treatment, it was not error to permit counsel on cross-examination to contradict a witness, by asking whether "Hulett," whom he had testified was a recognized authority, did not state that direct violence might cause depression, resulting in fractured cartilage, etc., the book being recognized and used as a text by defendant school for years, and the witness having previously thereto testified that according to the teachings of the defendant school there could be no fracture of the cartilage of the ribs.

8. ———: **Lay Witness: Opinions: Disease: Competency.** Permitting a lay witness, who had herself been a sufferer with asthma for years, to state that she had never discovered symptoms of asthma in plaintiff before entering defendant's school, was not prejudicial error.

9. **APPELLATE PRACTICE: Error in Instruction: Not Reversible Error.** In an action against a school of osteopathy and a member of its faculty, in which plaintiff alleged in her petition that defendant member broke and crushed her sternum, instructing that plaintiff claimed in her petition that defendant member "crushed, depressed, or fractured said gladiolus," etc., is not reversible error, in view of Revised Statutes 1909, section 2082; there being testimony that the gladiolus was part of the sternum, etc.

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Appeal from the Circuit Court of Monroe County.—*Hon. William T. Ragland,* Judge.

AFFIRMED.

Frank W. McAllister, C. E. Murrell and *Campbell & Ellison* for appellants.

(1) The court erred in permitting plaintiff to testify that Dr. Laughlin told her when he treated her that her ribs were broken like a "green stick fracture" (Ab. 36, 105). This was hearsay and prejudicial. Atkinson v. American School of Osteopathy, 240 Mo. 388, 356; McDermott v. Co., 73 Mo. 516, 520; Fry v. Railroad, 200 Mo. 377, 406; Price v. Thorington, 10 Mo. 135, 140; O'Brien v. Kenney, 74 Mo. 125, 127. (2) The court erred in admitting alleged statements of Dr. Charley Still made after the alleged injury without instructing the jury that they could not be considered as affecting his co-defendant. (Ab. 98, 99.) Abbott's Trial Evidence, page 188; 2 Wigmore on Evidence, sec. 1076, pp. 1275-6. (3) The court erred in admitting an alleged statement of Dr. A. T. Still to Dr. Laughlin (Ab. 38) to look for trouble right here. "It is sunk down on it." It was hearsay and inadmissible for any purpose. Abbott's Trial Evidence, page 188; 2 Wigmore on Evidence, sec. 1076, pp. 1275-6. (4) The court erred in overruling the objection to the purported conversation between plaintiff and defendant Still, and erred in refusing to strike out the answer of the witness (Ab. 33, 35). It was a self-serving declaration, and evidently designed to, and did, prejudice the jury, and was inadmissible for any purpose. Fourth National Bank v. Nichols, 43 Mo. App. 385, 390, 394; 2 Wigmore on Evidence, page 1258; State ex rel. Tiffany v. Ellison, 182 S. W. 997. (5) The court erred in overruling defendants' objection to the hypothetical question propounded to Dr. Mitchell (84, 85), and erred in refusing to strike out the answer of the witness, because said question as framed, was

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not supported by any proof because the answer is not responsive to the question being limited to the mere experience of the witness with his own patients. (6) The court erred in permitting the witness Esther Campbell to testify that plaintiff, in September, 1901, had no indication or symptoms of asthma. She was a lay witness and not shown to have any knowledge of the disease of asthma, and incompetent to answer the question. There is a sharp conflict in the testimony as to whether the plaintiff was afflicted with asthma in September, 1901, plaintiff contending that she was not, and defendant contending she was thus afflicted. Therefore, the evidence referred to was highly prejudicial, and given by one incompetent to answer the question. Reid v. Company, 58 Mo. 421; Sharp v. Company, 114 Mo. 94. (7) The court erred in permitting plaintiff's mother to state her mere conclusions and opinion as to the plaintiff's state of health. She was asked how low would the plaintiff get. Objection was made because the question necessarily calls for conclusion. The objection was overruled, and the witness stated she would get so low she could not stand anybody to move around or be in the room. She was also permitted to state that the plaintiff suffered pain. She was not asked as to the physical indications but stated she had pain (Ab. 13, 14). This evidence was prejudicial. (8) The conduct of the plaintiff in continually and habitually stating incompetent and prejudicial matters while on the witness stand and failing and refusing to answer questions, and instead thereof, indulging in addresses to the jury, was a palpable attempt on her part to influence and prejudice the jury, and the court should have granted a new trial on account of such conduct. Wajtylak v. Company, 188 Mo. App. 260. (9) The court erred in not granting a new trial because plaintiff and her witnesses Oven, Yost and Wening were guilty of palpable perjury. (10) The court erred in refusing to grant a new trial because the evidence of defendant is overwhelming that

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plaintiff did not sustain the injuries or any of the injuries of which she complains. (11) The court erred in not granting a new trial because of the misconduct of the jurors as shown by the affidavits filed with motion for a new trial as well as affidavits filed by respondents (Ab. 266, 288). Tatlow v. Grantham, 66 Mo. App. 509. (12) The court erred in giving Instruction No. 1 on the part of respondent (Ab. 256). It advised the jury that plaintiff claimed in her petition that defendant Still "crushed, depressed or fractured said gladiolus, and fractured the cartilages of the second, third and fourth ribs." Whereas the petition charged (Ab. 4) that defendant "broke and crushed plaintiff's sternum and forced the same in and upon her lungs and bulged and forced out the cartilages of her ribs on the right side of her body into an unnatural position." State ex rel. v. Ellison, 195 S. W. 722, 724. (13) The court also erred in giving instructions on behalf of respondent Nos. 2 and 4 for the same reason. State ex rel. v. Ellison, 176 S. W. 13. (14) The court erred in giving plaintiff Instruction No. 6 because it defines the word "negligently," and the words "ordinary care" to mean such care as an ordinarily prudent person would exercise, whereas this defendant is to be tested not by conduct of an ordinary person, but by the conduct of the ordinary osteopathic physician. Atkinson v. American School of Osteopathy, 240 Mo. 338. (15) The verdict is excessive. (16) The court erred in permitting plaintiff to ask the witness Laughlin the question (178) showing what Henor had written in his book. It was hearsay. Railroad v. Yates, 73 Fed. 587; McDonald v. Railroad, 219 Mo. 468, 492; Brown v. Company, 141 Mo. App. 382, 384, 17 Cyc. 421.

John Whiteside, W. W. Barnes and *J. H. Whitecotton* for respondent.

(1) The court did not err in the admission of the testimony of Dr. Laughlin as contended by appellant for the reason that it stands in the nature of an ad-

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mission by an agent, when in the line of duty, and as such is an admission of defendants. The authorities cited by appellants do not support their contentions. Atkinson v. American School of Osteopathy, 248 Mo. 338, 520; Phillips v. Railroad, 211 Mo. page 419, 441; Malecek v. Railroad, 57 Mo. 21. (2) The appellants are not in a position to complain of the nonaction of the court in not instructing as to the alleged statement of Dr. Charles Still as no instruction was asked by the appellant school. The court announced when the testimony was admitted that it was admitted because competent against defendants, Still, (Abst. 98). (3) This testimony was admissible on the ground of it being in the nature of an admission because not denied when made. The language used by the plaintiff charged Still with liability for her condition and injury, and was such as called for a denial of any liability by him which was not made at the time shown by the conversation. Coffey v. Tifony & Howard, 192 Mo. App. 455, 474. (4) The testimony of Esther Campbell as to the health of plaintiff as to asthma violates no principle of law. She first gave the facts in full and then stated that she never discovered any symptoms of asthma. "A non-professional witness may give his opinion as to the physical condition of another as to health with a full statement of the facts upon which he bases his conclusion," as was done in this case. Crowe v. Peters, 63 Mo. 429; Moore v. Moore, 67 Mo. 192; Norris v. R. R. Co., 239 Mo. 711. (5) The same is true as to the objections to the testimony of plaintiff's mother.

BECKER, J.—This suit was instituted April 17, 1906, in the circuit court of Adair county. Plaintiff seeks to recover from the defendants for malpractice in treating her by the method or system commonly known as Osteopathy. Plaintiff took a change of venue to Putnam county where a trial was had and a judgment resulted in favor of plaintiff and against the defendants in the sum of $10,000, from which an appeal was taken

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by the defendants to the Supreme Court of Missouri (sec. 240 Mo. 338, 144 S. W. 816), where the case was reversed and the cause remanded. Thereafter the venue was changed to Clark county and again to Monroe county, in which latter county the case was tried twice, the first trial resulting in a hung jury, and in the second trial plaintiff recovered a judgment in the sum of $5000, from which, after an unavailing motion for new trial, defendants bring this appeal.

A comprehensive, detailed statement of the facts in this case is found in connection with the Supreme Court's opinion when this case was there, to which reference may be had in that with a few minor changes, which will be noted in this opinion, the facts are identical with the case as we have it before us.

The amended petition on which the case was tried alleges that the American School of Osteopathy is a Missouri corporation owning a large amount of real estate and conducts a school whereby it teaches the science of Osteopathy, and has a regular organized faculty composed of teachers of such science conducting said school, and at the same time the members of the said faculty practice the science of curing and healing the sick and afflicted, and that it was the duty of the said faculty to treat and operate on students in attendance of said school without charge; that defendant, Charles E. Still, was a member of said faculty duly authorized to practice his profession and authorized to treat students of said school for any disease that they may have or contract during their attendance at said school. The petition then alleges that plaintiff became a student in the defendant school about October 1, 1901, and paid her tuition and attended the school until June, 1903, when she graduated and became a doctor of Osteopathy; that at the time she entered the school she had a slight affection of the nasal passages that slightly affected her breathing; that the defendant, Charles E. Still, examined her and undertook to treat her and continued to do so until some time in April,

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1902, when he "carelessly, negligently and unskillfully treated and manipulated plaintiff's body in so treating her for said maladies that he negligently and carelessly broke and crushed plaintiff's sternum, commonly known as the breastbone, and forced the same in and upon her lungs and bulged and forced out the cartilages of her ribs on the right side of her body into an unnatural position;" that as a direct result thereof, "she became sick and affected and has ever since suffered with asthma, uterine and rectal troubles, loss of flesh and suffered much bodily and mental pain and her general health has been permanently injured and she has been incapacitated from practicing her said profession or to earn her livelihood."

The defendants filed separate answers, Charles E. Still averring that he was and is an Osteopathic physician and that the plaintiff, when she entered the school as a student and before that time, was affected with asthma; that during the time she was a student he treated her several times, always with his best skill and ability and denied each and every other allegation, and for further answer alleged the pendency of another suit on the same cause of action by plaintiff against said defendant. The answer of the American School of Osteopathy is a general denial. Plaintiff's reply alleges that a suit had been filed by the plaintiff against the defendant, Charles E. Still, but that it was not a suit between the same parties nor on the same cause of action, and that said suit had been dismissed and was not then pending.

The bill of exceptions which we have before us covers more than five hundred pages. For the purposes of this case we set out such of the evidence adduced as we think necessary for a proper understanding thereof.

Plaintiff herself testified that she had gone to Kirksville to study Osteopathy in September, 1901, when she was about twenty-nine years old. At that time she was a little run down from nursing but was in good health and had never suffered with any physical

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ailments except measles; that she did not have asthma when she entered the defendant school as a student; that during the two years which she attended the defendant school Dr. Harry Still gave her two or three treatments, immediately after she had become a student, after which time the defendant, Dr. Charles E. Still, took her in charge up until the time of her alleged injury in April, 1902; that on the day she claimed to have received the injuries complained of she testified that the defendant, Charles E. Still, came into her room and said: "Good morning, Miss Atkinson, how are you this morning? I said, 'Dr. Charley, you are not doing me a bit of good. I am getting worse.' He said, 'I will take that out of you or I will break your neck,' and with that he put his knee against the breastbone and by putting his arms around the back he pulled with his hands and pushed with his knee, and drew me forward like that, and I said, 'Dr. Charley, you crushed my sternum in the breastbone.' He said,' I guess not.' I said, 'You did, I know you did,' and he said, 'Oh I guess not.' I said, 'Well I know you did,' and he went around to the back and felt the condition and he said, 'I guess you will come out all right. I didn't realize you were so small. I have just been treating a two-hundred pounds woman, and didn't realize the weight I was putting on you.'" She said that she felt the crushing of the bones but that there was not so much pain at the time; that it was the following day that she suffered much pain; that she kept going about the next day but suffered, "long shooting pains" "darting pains" all through the chest on her right side. On the second day she got up in the morning and went to attend one of the classes but she was suffering pain all the time and had to leave during the second class on account of the pain; that in the evening of said second day her roommate went for the defendant, Dr. Charles E. Still, who came and gave her treatment intended to relieve her; that when the defendant finished he said: "Miss Atkinson, what makes me feel so badly is to think I am the cause

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of all this suffering;" that the defendant gave her two treatments the day thereafter but that she did not receive much relief therefrom; that defendant then suggested he send for his father, Dr. A. T. Still, who was the founder and president of the defendant school; that said Dr. A. T. Still, accompanied by Dr. George Laughlin, a doctor of Osteopathy and a member of the faculty of the defendant school, came together and examined plaintiff, during the course of which Dr. Laughlin said: "The second, third and fourth ribs are broken like a green stick fracture;" that Dr. Still said to Dr. Laughlin: "The trouble is here, George. The trouble is right here, that is sunk down on there, get your hands right on the back of the three ribs here, but especially the three ribs and push it out and shove the thing up away from the chest, it is sunk down on it." She said that the treatment given her by the defendant, Still, had crushed the breastbone and and that the breastbone was lying flat back on the lungs and was crushed back and three ribs were broken and that such an injury would cause asthma; that in the fall of 1902 she had her first attack of asthma and that it grew worse and worse until when she graduated from the school she was having repeated attacks of asthma which continued off and on until the years 1905 and 1906, when she was not able to do anything; she was confined to her bed the greater part of the time; that she was again very ill in the summer of 1907; that her weight had fallen off from 102 pounds, which was her weight at the time she attended the school, until she weighed less than 80 pounds, and in 1907 her weight was but 60 pounds. At the time of the trial the condition of her chest was much better than it had ever been, though not normal, and in her opinion never would be.

Dr. Polmeteer, a doctor of Osteopathy, testified that he examined the plaintiff in the latter part of 1902 and found the middle part of the sternum lying down upon the lung, and stated that in his opinion it was caused by dislocation of some of the ribs; that

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the cartilages of these ribs seemed to be raised or bent.

Dr. Ash testified for the plaintiff that he was a practicing physician with 22 years' experience; that he had examined plaintiff and found evidences of injury to the thorax on the right side between the second and fifth ribs, and there was also a bulge of three ribs which was evidence of an injury to or the fracture thereof. In his opinion the injury was caused by external violence and that such injury could not have resulted from asthma.

Dr. F. O. Blattner testified for plaintiff that he was a practicing physician and had examined plaintiff and found an enlargement of the right side beginning at the sternum to the end of the intercostal cartilage, where it is connected with the ribs from the second to fourth. He stated that he found a slight depression on the sternum, and that external violence in his opinion was the cause of that condition, and that no disease would cause that character of deformity.

On cross-examination he stated that he had seen six cases of broken breastbone and that one case in particular was that of a man who was up and about though his breastbone had been broken three days before; that it is possible to break the breastbone without causing immediate great pain.

Dr. F. Mitchell testified for plaintiff that he was a physician and surgeon of 40 years' experience and had experience with asthma. In answer to the hypothetical question based upon testimony adduced with referenee to plaintiff's alleged injury, stated that in his opinion an injury so inflicted could be the cause of asthma.

Dr. Jost was a witness for plaintiff and testified that she was a roommate of plaintiff for a time when they were both attending the defendant school; that she was attending the class in manipulation, which class was being instructed by the defendant, Charles E. Still, and heard said defendant while talking about rib lesions and vetebra lesions, about the chest and ribs

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being distended in front, say: "You must not give a treatment and put your knee in the chest like this, because I had a patient that I did that way and I fractured her ribs," and that the defendant then turned around to the witness and said: "You remember the case, that Atkinson girl;" she had seen plaintiff having attacks of asthma and had seen her at times when she was suffering a great deal of pain and had to sit up in bed at nights and that when plaintiff was having an acute attack, as she often had for several days at a time, the plaintiff suffered excruciating pain; that she had examined the plaintiff and found her three ribs were bulged out and that these ribs pressed in upon plaintiff's lung; that the condition of plaintiff's chest was not the result of asthma but was in her opinion caused by external injury.

Mrs. Wenig testified she was a practicing Osteopath and graduated in the same class with plaintiff from the defendant school, and that she had been a roommate of the plaintiff; that she learned of plaintiff's injury the same day it occured as she had examined plaintiff's chest and found at that time a depression at the union of the first and second bones of the breastbone, and second, third and fourth ribs on the right side prominent and bulging at the breastbone and that they were bent at a sharp angle; that she made this examination on the day of the alleged injury and in the evening thereof and in the room occupied by plaintiff and the witness; that the plaintiff had extreme pain the following day; that she heard the defendant, Charles E. Still, say to plaintiff when he was treating her after the injury: "What makes me feel so badly Miss Atkinson, is that I am the cause of all this suffering," and also heard him say, "just before giving this treatment I had treated a woman of about two hundred pounds and I did not realize that I was using so much force and strength in treating this little woman."

Another witness for plaintiff was Dr. Anderson, who testified that he was a physician and connected

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with Dr. Hay's institute for the treatment of asthma; that he knew plaintiff since the year 1897: that she was then nursing Mrs. Campbell in Buffalo, New York, and that during that time, so far as he knew, plaintiff was a healthful woman and free from mental or physical ailments.

There were other witnesses who testified for plaintiff that she was in apparent good health about the time of the fall of 1901 when she went to attend the defendant school of Osteopathy.

On behalf of the defendants there was abundant testimony which tended to prove that no violence or any injury was done the plaintiff by the defendant, Charles E. Still, and also evidence which tended to prove that the plaintiff was afflicted with asthma when she came to Kirksville in 1901, and that this asthmatic condition progressed until plaintiff became a confirmed asthmatic and that the physical deformities and disease ascribed to the alleged injury in plaintiff's petition were the natural affects of asthma.

Defendants also adduced expert testimony to show that there were no present signs of the plaintiff's sternum or ribs having been fractured and that immediate collapse and very severe pain would be the immediate result of an injury such as plaintiff alleges she received at the hands of the defendant, Charles E. Still.

It will be noted that no question is made either in the pleadings or evidence as to the skill or learning of the defendant, Dr. Charles E. Still, in his profession of Osteopathy.

The defendants allege it was error to permit plaintiff to testify that Dr. George Laughlin told her at the time he was making his diagnosis preparatory to giving her a treatment that her ribs were broken like, "a green stick fracture," on the ground that such testimony was hearsay and prejudicial. But we do not concur in that view. Dr. Laughlin, as well as Dr. A. T. Still, visited the plaintiff at the request of the defendant, Dr. Charles E. Still, a day or two after

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plaintiff met with her alleged injury. Dr. A. T. Still was at the time the president of the defendant school and Dr. Laughlin was dean of the college and a member of its faculty. This evidence was admitted on the ground that the doctor was the agent of the defendant and visited plaintiff at said defendant's request and for the purpose of treating the plaintiff. What Dr. Laughlin said at the very time he was so examining plaintiff as to what he found with reference to plaintiff's then condition, under the circumstances of this case, is admissible. Nor was it error to admit the alleged statement by Dr. Laughlin of the kind and character of fracture he found, namely that the break was like "a green stick fractured." A careful reading of the opinion of the supreme court, when this case was before it, clearly shows that the learned trial judge properly construed it on the point in question and allowed the witness to testify only as to what the doctor had said with reference to the condition he found the plaintiff in at the time he made his diagnosis, but did not permit the witness to state what the doctor had said as to what *in his opinion had caused plaintiff's condition.* The record in the former appeal on this point shows that plaintiff had been permitted to testify not only that Dr. Laughlin had stated that plaintiff's second, third and fourth ribs were broken, but in addition that such injury was *"caused by Dr. Still's treatment"* (Italics ours). It was the admission of that part of the statement which we have italicized that the supreme court held was reversible error, because while Dr. Laughlin was the agent of the defendants to treat the plaintiff, he was not their agent to talk about past occurrences and his remarks concerning the *cause* of plaintiff's injury was not a part of the *res gestae.* The *cause* of her condition was the real question in issue.

It is almost trite to restate the rule that he who employs or permits another to do an act in his place as agent is chargeable by such acts as are done under that authority, and so too, bound by admissions made

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by such agent in the course of exercising that authority. In the instant case the defendants do not controvert the assertion that the defendant, Still, treated the plaintiff as the agent and employee of his codefendant, American School of Osteopathy, and we hold that if as testified to by plaintiff, Drs. A. T. Still and Laughlin called on plaintiff at the request of said defendant, Still, for the purpose of examining plaintiff and diagnosing her case and determining her then condition it clearly follows that what either of said doctors said, at the time and while they were making such examination, with reference to what they or either of them found to be the then condition of plaintiff's sternum, ribs, etc., is admissible, such statements being made in the scope of their duty and while in the actual performance thereof. Such statements are also admissible as against the defendant school on the ground that Dr. A. T. Still was president and Dr. Laughlin dean of the said defendant school at the time and according to defendant's testimony whatever treatments they gave plaintiff were given her in their capacity as such. [See Atkinson v. School of Osteopathy, 240 Mo. 338, l. c. 356, 144 S. W. 816.]

The defendants complain that it was error to admit the alleged statements that defendant, Still, while treating plaintiff a day or two after she received her alleged injury, had said: "What makes me feel so badly, Miss Atkinson, is that I am the cause of all this suffering," and: "Just before giving this treatment I had treated a woman of about 200 pounds and I did not realize that I was using so much force and strength in treating this little woman." The record shows that objection thereto was made solely on behalf of the defendant school and on the ground that it was "hearsay and not part of the *res gestae*," whereupon the court ruled: "Being competent as to the other defendant, objection overruled." The defendant, by counsel, then objected to the admission of such testimony on the ground it was "hearsay and plaintiff

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having elected to sue both, not admissible against either." This latter objection was overruled.

Clearly, we think, the admissions were admissible as against the defendant Still, and under the state of the record in this case it is not necessary that we decide whether the statements would have been admissible against the defendant school. The learned trial judge in overruling the objection of the defendant school stated specifically that he held the statement admissible only as against defendant Still. The court did not commit prejudicial error in not instructing the jury, of its own motion, that such statements could be considered by them as effecting the defendant, Still, alone, counsel for defendant school having made no request for such an instruction.

Defendants next assign as error that the plaintiff was permitted against their objection to testify as to a purported conversation between herself and defendant Still, on the ground that such testimony was a self-serving declaration and evidently designed to prejudice the jury, and that such alleged conversation was inadmissible for any purpose. The gist of the alleged conversation which was thus admitted was that plaintiff had therein charged the defendant, Still, with being responsible for her alleged injuries and resultant condition and such charge or accusation was not at the time denied by said Still. It is evident that the conversation was admitted under the rule *qui tacet consentire videtum,* and though this ancient maxim is subject to certain qualifications and conditions, and while we have in mind "that nothing can be more dangerous than this kind of evidence" (Phillips v. Towler's Adm'rs, 23 Mo. l. c. 403), we are constrained in the instant case to hold that under the circumstances as shown by the record before us the learned trial judge properly permitted plaintiff to state the conversation complained of. Plaintiff and defendant, Still, were alone and said defendant was under neither fear nor restraint nor does it appear that he was physically disabled from answering. If plaintiff's

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testimony is to be credited said defendant not only *did not* deny the charge, but when asked: "What are you going to do for me?" replied, "What do you want? I have got seventy-five cents if that will do you any good;" then offered to give plaintiff a position as nurse in the school and when plaintiff told him she was not strong enough to take such a position he offered to make her matron of the hospital, which proferred position plaintiff, according to her testimony, declined because the condition of her health would not permit her to accept so great a responsibility and suggested instead that said defendant give her a thousand dollars, which defendant declined to do and finally told her: "Sue me if you like . . . sue me, sue me, but you will not get ten cents."

Plaintiff charging said defendant with having injured her by his treatment was certainly a fact concerning which he was immediately concerned and a charge which he presumably understood and comprehended and whether the facts embraced in the charge were true or not no one probably knew better than he. Said defendant at the time of the conversation, being face to face with plaintiff, such a charge would properly and naturally call for some action in reply from men similarly situated and he was in such a position that he was at liberty to make a reply, if he did not intend to admit it. [Greenleaf on Evidence (16 Ed.), sec. 198; Banks v. Nichols, 43 Mo. 385; See, State ex rel. Tiffany v. Ellison (Mo.), 182 S. W. 996 and cases there cited.] The conversation was properly admissible as against defendant Still and whatever inference his silence under these circumstances may have warranted, was subject to denial by defendant or any explanation in rebuttal by circumstances showing that the silence was due to other motives. [2 Wigmore, Evidence, p. 1261.]

Defendants next assign as error that Dr. Mitchell, a witness for plaintiff, was asked a hypothetical question predicated upon assumed facts upon which the witness was asked whether or not, "in your opinion

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would this injury so inflicted have been calculated to produce said asthmatic condition in the patient?" To which the witness answered: "In mine, yes, sir." After the answer had been given defendants made the following objection: "Defendants object to the question and answer because—object to the question, because no facts upon which to base it, and because it does not include all the facts in testimony, and object to the answer, because it is limited solely and entirely to a personal experience of the witness." Defendants' counsel cite us no authority on this point.

We have carefully examined the question and find that it properly covers all the essential facts as appear from the evidence given in support of plaintiff's case and contains no assumed fact not warranted by the evidence. In fact the question presupposes a state of facts more favorable to defendants than necessary to meet full compliance with the rule. Every party has the right to put before the jury the scientific inferences properly deducible from such facts as the evidence tends to prove and subject to the contingency that the jury shall find such facts to be as claimed. The rule is that the court will permit counsel to put to the expert, after his competency has been established, a question in which the things, which the evidence adduced tends to prove, and which counsel claims to have proved, are stated as a hypothesis, and the witness is asked to state and explain the conclusions which, in his opinion, result. Then if the jury should find that the facts assumed in the question have been proven by the evidence, they may use the technical information and instruction obtained from the expert in determining the ultimate facts; but if they should find that the facts assumed in the question are not true, then of course the opinions based on them should be wholly disregarded. [11 R. C. L. 578; Russ v. Railroad Co., 112 Mo. 45, 20 S. W. 472; Hicks v. Railroad Co., 124 Mo. 115, 27 S. W. 542; Root v. Railroad Co., 195 Mo. 348, 92 S. W. 621; Lyons v. Street Ry. Co., 153 Mo. 143, 161 S. W. 726.] As for the objection that Dr. Mitchell's

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answer is limited solely and entirely to his personal experience, the point is clearly without merit. [Wood v. Street Railway Co., 181 Mo. 433, 81 S. W. 152; Redman v. Street Ry. Co., 185 Mo. 1, 84 S. W. 26.] We hold the objection to the hypothetical question, as well as the answer thereto, were property overruled.

We come now to the assignment that the court erred in permitting counsel for plaintiff to ask the witness, Dr. Laughlin, the question as to whether or not Hulett (whom the witness had already testified was a recognized authority among Osteopaths) in his book did not make the statement that, "direct violence may cause depression, in which case there is likely to be a fractured cartilage—occasionally the row of cartilages on one side will be more prominent than those on the opposite?" The objection made by learned counsel for defendants is that it is "hearsay." Hulett's book from which the statement was read, was a book recognized and used as a text book by the defendant school for years, and the witness in question had so stated and previously thereto had testified that according to the teachings of the defendant school there could be no fracture of the cartilage of the ribs. There was therefore no error in submitting the question. It is permissible on cross-examination to read to the witness statements contradictory to his opinions, found in books which he admits to be authoritative, and to ask him to explain the contradiction. This practice is allowed on the theory that the books are referred to merely to test and discredit the knowledge of the witness. [11 R. C. L. 590; Greenleaf on Evidence, (15 Ed.), p. 579; McDonald v. Ry. Co., 219 Mo. 468, l. c. 492, 118 S. W. 78, and cases there cited.]

Esther Campbell, a witness for plaintiff, was permitted to testify that she had never discovered any indications or symptoms of asthma in plaintiff from 1898 to September, 1901, the month in which plaintiff entered the defendant school as a student. This is assigned as error. Witness was sixty-two years old and had been an asthmatic for years and for the greater

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part of the time from 1898 to 1901 witness had employed plaintiff as her nurse. She stated that plaintiff, during all that time, was never sick—had only an occasional headache or bilious attack. She further stated that in 1905 plaintiff was at her home and suffered with asthma—had two doctors in attendance on plaintiff; that plaintiff was very sick and when plaintiff left her home to go to Kirksville in that year she had to be accompanied by a trained nurse. Witness stated further that "as to the condition of plaintiff's chest, ribs or sternum, not being a physician, I cannot answer that question."

While it is undoubtedly the rule that a lay witness will not be permitted to attempt a diagnosis, yet in the instant case and under the particular circumstances herein, and in view of the fact that the witness herself for years was a sufferer with asthma, we hold that the admission of the statement that the witness saw no indications or symptoms of asthma in plaintiff during the period preceding plaintiff's going to Kirksville, was not prejudicial error. [See Norris v. Ry. Co., 239 Mo. 697, l. c. 711, 144 S. W. 783; Kropp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107.]

As to the instructions, it is alleged as error that No. 1, as well as Nos. 2 and 4, given on the part of plaintiff, advised the jury that plaintiff claimed in her petition that the defendant, Still, "crushed, depressed or fractured said gladiolus and fractured the cartilages of the second, third and fourth ribs;" whereas the petition charges that defendant, "broke and crushed plaintiff's sternum and forced the same in and upon her lungs and bulged and forced out the cartilages of her ribs on the right side of her body into an unnatural position." Learned counsel for appellants cite us State ex rel. Central Coal & Coke Co. v. Ellison, et al. (Mo.), 195 S. W. 722, and State ex rel. Nat'l Newspaper Ass'n v. Ellison, et al. (Mo.), 176 S, W. 13, and Eads v. Galt Telephone Co. (Mo. App.), 199 S. W. 710, as authorities that what appellants here complain of in said instructions is reversible error. We do not

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agree with this interpretation of these cases. In each of these cases the error complained of was one affecting the question whether the acts of negligence which the instructions required the jury to find, were sufficient when viewed in light of the acts of negligence charged in the petition and in light of the evidence adduced in the case; but the question as to whether the rule laid down in each of these cases should be applied in all its strictness when considering the sufficiency of a statement of injuries in an instruction which are set out therein as and for those which are alleged in plaintiff's petition is not discussed.

An instruction which purports to state what a petition claims are the injuries alleged to have been sustained by reason of any negligent act or acts, should correctly set out such alleged injuries. However, when through oversight or mistake the exact language of the petition is not used in describing such alleged injuries, an appellate court will view an error of this kind in light of section 2082, Revised Statutes of Mlissouri, 1909, and determine whether in the given case the matter complained of is error which materially affects the merits of the action; and that would be the case even without any legislative enactment. [See Trainer v. Sphalerite Min. Co., 243 Mo. 359, l. c. 371, 148 S. W. 70.] It is not every error that is prejudicial and "reversible error excludes the consideration of any error or defect not affecting the substantial right of the complaining parties." [Shinn v. United Railways Co., 248 Mo. 173, 154 S. W. 103; Revised Statutes of Missouri, 1909, sec. 1850.] Just how or wherein the defendants were or could have been prejudiced by the matter complained of is not set out either in the point as made in the brief or in the argument for said defendants who are appellants here. The difference in the wording is more apparent than real. It is true the word "gladiolus" is used in the instruction instead of the word "sternum," which is used in the petition, but the record is replete with expert medical testimony in which the statement repeatedly appears that the

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"*gladiolus*" is a part of the "*sternum,*" and there is testimony also that the "bulging and forcing out the cartilages of her ribs on the right side of her body into an unnatural position" was tantamount to saying that the rib had in point of fact been "fractured." At best in view of the entire record in this case we can view the objection only in the light of a technical one and we are mindful of the fact that in this case the alleged injuries were suffered in April, 1903, and the case has been tried before a jury three times as well as having been reviewed on appeal by our supreme court. While the said instructions are unfortunate in their wording, we hold the matter complained of does not, in the instant case, amount to reversible error.

There are several other points of error brought here. We have carefully examined into each of them and find them without substantial merit and it is not necessary to burden this opinion with a discussion of them.

Finding no prejudicial error and the judgment being for the right party is to accordingly affirmed. *Reynolds, P. J.,* and *Allen, J.,* concur.

D. B. McCONNELL, Respondent, v. STORY & CLARK PIANO COMPANY, a corporation, GARNISHEE OF WILLIAM P. RAMSDELL, Defendant, F. A. KILBER, Interpleader, Appellant.

St. Louis Court of Appeals. Opinion Filed April 2, 1918.

1. **GARNISHMENTS: Costs: Attorney's Fees Allowed and Taxed as Costs.** Under section 2436, Revised Statutes 1909, attorney's fees may be allowed in favor of a garnishee in garnishment on execution as well as garnishments on attachment, which fees are to be taxed as costs.

2. **———: ———: Interpleader: Not Entitled to Allowance of Attorney's Fees.** But such attorney's fees cannot be allowed to one becoming an interpleader in a case under section 2439, Revised Statutes 1909, in a garnishment case under execution.

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Appeal from the Circuit Court of the City of St. Louis.—*Hon. Wilson A. Taylor,* Judge.

AFFIRMED.

T. T. Hinde and *Taylor R. Young* for appellant.

(1) Either under the Attachment or Garnishment Act a claimant may interplead. R. S. 1909, section 2345; R. S. section 2421. But since there seems to be some confusion as to whether or not a claimant may interplead under these sections in garnishment under execution, in the case at bar, upon motion of the plaintiff, the claimant was ordered by the court to interplead. As to a discussion of said confusion see the following decisions of this branch of our appellate court: Schawacker v. Dempsey, 83 Mo. App. 342, p. 352; Good ex rel. v. Sleeth, 176 Mo. App. 619, pp. 631-3. (2) Both under our Attachment and Garnishment Acts costs may be adjudged in favor of a successful interpleader. R. S. 1909, sections 2346, 2422. (3) As to the right to recover costs, the garnishee and interpleader in either attachment or garnishment are placed on the same footing. R. S. 1909, sections 2300, 2303; State ex rel. v. Lumber Co., 70 Mo. App. 663, p. 666; State ex rel. v. Pittman, 131 Mo. App. 299, p. 303. (4) Expressly by statute when judgment goes against the plaintiff, the garnishee may recover his expenses, including a reasonable attorney's fee. R. S. 1909, section 2436. And this section applies in garnishment under execution, although not expressly warranted by the statute. R. S. 1909, section 2414; O'Reiley v. Cleary, 8 Mo. App. 186, 192. (5) In the following cases the interpleader sued on the attachment bond and recovered his attorney's fees. State ex rel. v. Lumber Company, supra, p. 666; State ex rel. v. Silverstein & Co., 77 Mo. App. 304, 309. (6) In the O'Reiley case, supra, decided by this branch of our appellate court the garnishee recovered attorney's fees in garnishment on execution. This

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case has neither been overruled nor criticised, but, on the contrary, has been cited with approval in Norman v. Eastburn, 230 Mo. 168, see p. 184.

Frank J. Quinn for respondent; *Durham & Durham* (Of Counsel).

The sole error complained of by appellant, following the rules of this court is definitely set forth on page 4 of his brief, and is as follows: The court erred in declaring the law to be that a successful interpleader is not entitled to recover expenses, including attorney's fees, and that the court can confiscate an interpleader's claim and make him pay for the privilege of confiscation. A complete answer to such an assignment of error is made when it is said that the bill of exceptions does not contain any declarations of law on the part of the court, and unless preserved by a proper bill of exceptions they are no part of the record on appeal. Wellman v. St. Ry. Co., 219 Mo. 126. Neither does the bill of exceptions contain a motion for a new trial, nor a request for the clerk to set out any such motion for a new trial. In such case there is nothing for the appellate court to review, save only the record proper, and all matters of exception are waived. Groves v. Terry, 219 Mo. 595; 3 Corpus Juris, 960-963, and Missouri cases cited in note 79. If the action is not an independent action then the whole thing should have been preserved in a proper bill of exceptions, showing the motion, the testimony, the ruling and judgment, and an exception to same, and finally, when a final judgment had been rendered in the original cause, the whole matter should have been called to the court's attention anew in a motion for a new trial and such motion for a new trial, the ruling thereon and exceptions to such ruling all preserved and made a part of the record by a proper bill of exceptions. Bosley v. Parle, 35 Mo. App. 236; Mann v. Warner, 22 Mo. App. 577. The court could not render a judgment for the interpleader for his

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damages and attorney's fees (assuming that an interpleader might be entitled to such a judgment), after the term at which the judgment was rendered on the interplea and after an appeal had been granted to the other party. Ladd v. Couzins, 52 Mo. 454; Mann v. Warner, 22 Mo. App. 577. The record does not show a final judgment for the respondent or against the appellant on the motion for damages and attorney's fees. The so-called judgment as set out in the abstract (Abs., 23), is nothing more than a finding by the court, and if a judgment was entered on such finding the record does not disclose it. Such a mere finding will not support an appeal, unless followed by an actual entry of judgment. Rubey v. Shain, 51 Mo. 116; Sperling v. Stubblefield, 83 Mo. App. 266; 3 Corpus Juris, 612; Bick v. Umstattd, 137 Mo. App. 270. If the abstract is erroneous it is not the duty of the respondent to correct it, but the duty is on appellant to show to the court by a proper abstract of record facts necessary to overturn the judgment from which he appeals. Gooden v. Mod. Woodmen, 194 Mo. App. 666.

BECKER, J.—Appellant was interpleader below in a garnishment proceeding under execution, having been brought into the case on plaintiff's motion on the order of the trial court under authority of section 2439, Revised Statutes of Missouri, 1909.

At the close of the plaintiff's case on a hearing of the interplea before the court and a jury, plaintiff took an involuntary nonsuit with leave to set same aside, and judgment was accordingly rendered in favor of the interpleader and against the plaintiff. Thereafter plaintiff filed his motion to set aside the involuntary nonsuit and grant a new trial on the interplea. Said motion was overruled. In due course the interpleader and the garnishee filed a "motion for damages" in which they move the court to render judgment against the plaintiff in favor of said interpleader and said garnishee for a sum sufficient to indemnify them for

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reasonable attorney's fees in attending and answering and defending their rights in the case and "pray judgment against the plaintiff in the sum of $250 as the damages suffered by them by reason of the aforesaid litigation."

The learned trial judge on a hearing of this motion allowed the garnishee $100 for expenses in answering in the proceeding, such allowance to be taxed as costs against the plaintiff and to be paid as part of the costs of the proceedings, and overruled the motion for damages and for an allowance of attorney's fees to the interpleader.

The interpleader thereupon filed his motion to set aside the order overruling his motion for an allowance for damages and award a new trial thereon; the same being overruled the interpleader brings this appeal.

The sole question before us is as to whether or not an interpleader brought into court under section 2439, Revised Statutes of Missouri, 1909, who upon a hearing of the interplea has judgment rendered in his favor, is entitled to an allowance to recover his expenses, including a reasonable attorney's fees, and to have the same taxed as costs in the case.

We have carefully read all the authorities cited by the learned counsel for the appellant but fail to find therein any authority for the proposition contended for. It is true, under section 2435, Revised Statutes of Missouri, 1909, that a garnishee is entitled to a reasonable allowance for his trouble and expenses in answering, to be paid out of the funds or proceeds of the property or effects in his hands, if it appears from the garnishee's answer that he is possessed of property belonging to or is indebted to the defendant, and such answer of the garnishee is not excepted to or denied. And there is authority holding that under section 2436, Revised Statutes of Missouri, 1909, attorney's fees may be allowed in favor of a garnishee in garnishment on execution as well as garnishment on attachment, which fees are to be taxed as costs in the

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case. [See O'Reilly v. Cleary, 8 Mo. App. 186; Norman v. Eastburn, 230 Mo. 168, l. c. 184, 195, 130 S. W. 276.] But nowhere do we find any statute authorizing an allowance of attorney's fees to one becoming an interpleader in a case under section 2439, Revised Statutes of Missouri, 1909, in a garnishment case under execution. The judgment is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

NELLIE F. PECK, AUSTIN PECK, Jr., and R. LESLIE PECK, Appellants, v. Estate of ELIZABETH FILLINGHAM, deceased, ARTHUR FILLINGHAM, executor, Respondent.

St. Louis Court of Appeals. Opinion Filed April 2, 1918.

1. **EXECUTORS AND ADMINISTRATORS: Subrogation: Claim against Estate: Jurisdiction of Probate Court: Statute.** While section 198, Revised Statutes 1909, provides that the probate court shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate, yet the probate court has no jurisdiction over a claim against a testatrix's estate arising from the fact that mortgagees foreclosed deeds of trust given by testatrix on realty specifically devised to claimants, thus forcing claimants to pay the incumbrances, they claiming to be subrogated to the rights of the holders of the incumbrances and to have the claim allowed against the estate; for subrogation is a subject cognizable alone in courts which have equitable jurisdiction.

2. **COURTS: Probate Courts: Powers: Jurisdiction.** In Missouri, the probate courts have no inherent powers, their powers being entirely derivative, and they exercise such powers only as are conferred by or implied from legislation.

3. ———: ———: ———: ———. And while probate courts, in administering justice in proceedings over which they have jurisdiction, may apply equitable and common-law principles in reaching their conclusions, they have no common-law or chancery jurisdiction.

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4. **SUBROGATION: Subrogation to Claim against Estate: Secured Incumbrances: Statute.** Section 197, Revised Statutes 1909, provides that when a claim is allowed against an estate, which is secured by a mortgage, deed of trust, or other lien, held by the creditors, the same may be allowed as other claims, but shall not be paid until such security held by the claimant has been exhausted; but if the security be not sufficient to pay off and discharge the debt of such creditor, then such creditor, for the residue of the debt, shall be entitled, in common with other creditors, to have it paid out of the estate. *Held*, that since, under the statute, mortgagees of realty specifically devised, who had the amounts of their debts paid off in full through the sale of the property secured by the deeds of trust, they purchasing the property at such foreclosure sale, such mortgagees had thereafter no claim whatsoever against the estate of the deceased; also, they had no claim against such estate on the theory of subrogation, for on that theory they can only stand in the shoes of the mortgagee at the time of the death of the decedent.

5. **WILLS: Devise Subject to Incumbrance: Statute.** Section 542, Revised Statutes 1909, provides that a charge or incumbrance upon any real or personal estate to secure the payment of moneys, etc., shall not be deemed a revocation of any will relating to the estate previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance, *held* that unless a will specifically provides otherwise, or the intent of the testator is manifest from the instrument itself that real estate devised subject to an incumbrance shall have the amount of the incumbrance paid off out of the assets, such real estate passes to the devisee subject to such incumbrance.

6. **COURTS: Circuit Court: Probate Court: Suit to Construe Will: Jurisdiction.** The probate court has no jurisdiction of a suit to construe testatrix's will as to her intention whether or not incumbrances on realty devised should be paid off out of funds of the estate, such suit must originate in the circuit court.

Appeal from the Circuit Court of St. Louis County.—*Hon. G. A. Wurdeman*, Judge.

AFFIRMED.

E. P. McCarthy and *T. D. Cannon* for appellants.

(1) The circuit court erred in holding that the probate court was without jurisdiction to hear and decide the issues raised herein. The Constitution of this State gives the probate courts jurisdiction "over

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all matters pertaining to probate business;" as to matters pertaining to probate business the statute declares that the probate courts shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of the testator or intestate. It matters not whether the demand be regarded as legal or equitable, the statute confers upon the probate court ample jurisdiction to determine the same. Constitution of Missouri, art. 6, sec. 34; Stanton v. Johnson's Estate, 177 Mo. App. 54, 57; Johnson v. Johnson, 72 Mo. App. 386, 388; State ex rel. v. Shackelford, 263 Mo. 52-63; Jarboe v. Jarboe, 227 Mo. 59, 93; Lietman's Extr. v. Lietman, 149 Mo. 112, 117; In re Estate of Elliott, 98 Mo. 379, 384; Hammons v. Renfrow, 84 Mo. 332; 340-341; French v. Stratton, 79 Mo. 560, 562-563; Johnson v. Beasley, 65 Mo. 250, 256; Ensworth v. Curd, 68 Mo. 282; Pierce v. Calhoun, 59 Mo. 271; Tittertington v. Hooker, 58 Mo. 593; 1 Woerner on Adm. (2 Ed.) sec. 149, p. 361-2; Rice on Probate Law, 265. (2) The devise of the real estate by the fourth clause of Elizabeth Fillingham's will, shows by its recitals that the testator intended to give said real estate to her daughter, Mrs. Peck and her daughter's children free of incumbrance. The children at the time were mere infants and wholly without estate aside from that willed to them by testator; the daughter, Mrs. Peck, was without means except the property devised by her mother. The clear intention of the testator was that the daughter would use the rents and profits and said real estate for her support during life and after Mrs. Peck's death the property would pass to the children. Knight v. Newkirk, 92 Mo. App. 258; Darr v. Thomas, 127 Mo. App. 1; Morris v. Bassett, 132 Mass. 502; Brown v. Baron, 162 Mass. 56; Sutherland v. Harris, 86 Ills. 363. (3) The holders of the encumbrances on the real estate specifically devised to plaintiffs could have proved up their claims against the estate of Elizabeth Fillingham in the probate court, but they did not do so; they

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chose to foreclose the deeds of trust and sell plaintiffs properties. Plaintiffs having been thus forced to pay the said encumbrances on said real estate specifically devised, under the distressing circumstances shown in the evidence in this case, are subrogated to the rights of the holders of said encumbrances, and are entitled to have this claim allowed against the estate. Berthold v. Berthold, 46 Mo. 557; Allen v. Dermott, 80 Mo. 56; Fowler v. Fowler, 78 Mo. App. 330, 334; Foster v. Williams, 144 Mo. App. 220, 224. (4) The declaration of law asked by the plaintiffs and refused by the court should have been given at the close of the whole case. There was no conflict in the testimony; it appears beyond contradiction that the estate of Elizabeth Fillingham is solvent; it appears beyond contradiction that the encumbrances upon the real estate devised to plaintiffs specifically to the amount of $3589.63, was paid by compulsion by plaintiffs. It appears therefore that the plaintiffs are entitled to a direction from this court to the trial court to enter judgment for the plaintiffs upon the cause of action set forth in their petition, with interest at the rate of six per cent per annum from the date of filing the claim in the probate court. Section 2083, R. S. 1909; Warfield v. Hunt, 91 Mo. App. 541, 551; Meffert v. Dyer, 107 Mo. App. 462, 466; Rice v. Shipley, 159 Mo. 399, 409, Dickson v. Rouse, 80 Mo. 224, 228; Smith v. White, 165 Mo. 590, 596; State ex. rel. Walbridge, 153 Mo. 194, 204.

Rassieur, Kammerer & Rassieur for respondent.

(1) Under the Missouri law, the devisee takes encumbered property subject to the encumbrance, and the property itself is primarily liable for the payment of the encumbrance, and not the personal property belonging to the estate of the testator. The Missouri statute has abrogated the common law in that respect. Sections 197, 542, R. S. 1909; 2 Schouler on Wills, etc.

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(5 Ed.), sec. 1430. (2) The property itself being primarily liable for the payment of an encumbrance existing thereon, the property alone must be looked to for the payment thereof in the absence of personal property belonging to the estate. The encumbrance cannot be transferred from one property to another. Adams v. Adams, 183 Mo. 396; Darr v. Thomas, 127 Mo. App. 1, 8; 2 Schouler on Wills, etc. (5 Ed.), sec. 1430. (3) Probate courts possess no inherent powers, have no equitable jurisdiction, and exercise such powers only as are conferred by or implied from legislation, and can consequently not hear a claim based solely on the doctrine of subrogation. In re Elliot's Estate, 27 Mo. App. 218; Bramel v. Cole, 136 Mo. 201; Ford, Administrator v. Talmage, 36 Mo. App. 65; First Baptist Church v. Robberson, 71 Mo. 326; Butler v. Lawson, 72 Mo. 227; Reed v. Reed, 94 Mo. 590; Evie v. Ewing, 120 Mo. App. 129; State ex rel. v. Bird, 253 Mo. 579; 11 Cyc. 795. (4) Courts of equity alone have authority to construe wills (with the exception of the incidental authority possessed by probate courts to enable them to properly distribute the assets of estates), and alone have power to follow trust funds or impose conditions or limitations upon their use or disposition. First Baptist Church v. Robberson, 71 Mo. 326; Woerner's Law of Administration (2 Ed.), par. 155; 40 Cyc. 1842.

BECKER, J.—This case originated in the probate court of St. Louis county where plaintiffs below, appellants here, filed a claim against the estate of Elizabeth Fillingham, deceased. Said probate court dismissed plaintiffs' claim on the ground that it had no jurisdiction. On appeal the circuit court of St. Louis county heard the case without the intervention of a jury, and ruled that the probate court was without jurisdiction to entertain plaintiffs' claim and accordingly entered judgment for the defendant. After an unavailing motion for new trial, plaintiffs bring this appeal.

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The demand upon which this claim is based will best be understood by setting out in full the claim as originally filed. It is as follows:

"Claimant Nellie F. Peck states that she is the wife of Austin Peck, and daughter of Elizabeth Fillingham; that claimants August Peck, Jr., and Leslie Peck are her sons and only children."

"Claimants state that under and by the terms of the last will of said Elizabeth Fillingham said testatrix devised to claimant Nellie F. Peck for her use during her life and at her death to her children, certain property therein described as lots numbered 12 and 15 in block A of plat of West Horton Place, in the county of St. Louis and State of Missouri;"

"That said Elizabeth Fillingham during her lifetime, towit on August 20, 1903, made and executed her promissory note of that date payable to the order of Edward H. Fisher three years after date for the principal sum of twenty hundred dollars, bearing interest at eight per cent, from maturity, which note was signed by Elizabeth Fillingham and her husband, Charles Fillingham; that at the same time said Elizabeth Fillingham and her husband executed a deed of trust by which they conveyed to Charles F. Vogel as trustee for said Edward H. Fisher said property above described as lot 12 in block A of West Horton Place, in trust to secure the payment of said principal and interest; that at the time of the death of said Elizabeth Fillingham there was due from her on said note the sum of eighteen hundred dollars principal and $41.25 interest represented by a note signed by her August 20, 1906, for $49.50; that no part of said sum was paid by said Elizabeth Fillingham or her estate; that because of said non-payment of said principal and interest the then holder of said note advertised said property for sale at foreclosure sale under said deed of trust and on or about the 3rd day of September, 1910, said property was sold at foreclosure sale under said deed of trust for the purpose of satisfying said principal and interest; that out of the proceeds of said

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sale said indebtedness of said Elizabeth Fillingham then amounting to the sum of $1800 principal $203.63 interest and $41.50 costs of sale, or a total of $2045.13, was paid;"

"Claimants state that by reason of said payment of said indebtedness of said Elizabeth Fillingham out of the proceeds of sale of her property said estate of Elizabeth Fillingham is now indebted to them in the sum of $2045.13;"

"Claimants further state that said Elizabeth Fillingham assumed payment of two certain principal notes for a total of fourteen hundred dollars dated January 31, 1900, made by Lillie E. Campbell and Isaac W. Campbell and secured by deed of trust on property hereinbefore described as lot 15 of block A of West Horton Place; that neither of said notes nor any part thereof was paid by said Elizabeth Fillingham and that at the time of her death there was due from her on said note the sum of fourteen hundred dollars principal with interest; that no part of said indebtedness was paid by the estate of said Elizabeth Fillingham; that because of said non-payment of said principal and interest the then holder of said notes advertised said property for sale under said deed of trust and on the 14th day of January, 1911, said property was sold at foreclosure sale under said deed of trust for the purpose of satisfying said indebtedness of Elizabeth Fillingham then amounting to the sum of $1491.06 interest and $53.44 costs, or a total of $1544.50 was paid;"

"Claimants state that by reason of said payment of said indebtedness of Elizabeth Fillingham out of the proceeds of sale of their property said estate of Elizabeth Fillingham is now indebted to them in said sum of $1544.50."

"Wherefore claimants present this claim and demand for said first named sum of $2045.13 and said second named sum of $1544.50, to-wit for the total sum of $3589.63 due them as aforesaid from said estate of Elizabeth Fillingham, and ask that the same be allowed

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and classified as a demand and charge against said estate and that the executor thereof be ordered to pay the same out of said estate."

Learned counsel for plaintiffs seriously contend that the circuit court erred in holding that the probate court is without jurisdiction to hear and to determine the issues raised herein. The gist of the argument made in support of this contention is that the Constitution of this State gives the probate court jurisdiction "over all matters pertaining to probate business" and the statute declares that the probate court shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of the testator or intestate and therefore it matters not whether such demand be regarded as legal or equitable, and that since the holders of the encumbrances on the real estate specifically devised to plaintiffs could have proven up their claim against the estate of Elizabeth Fillingham in the probate court, but instead said mortgagees having chosen to foreclose the deeds of trust and sell plaintiffs' property, thus forcing the plaintiffs to pay the said encumbrances on the real estate specifically devised to plaintiffs, the said plaintiffs are thereby subrogated to the rights of the holders of said encumbrances and are entitled to have this claim allowed against the estate.

The fallacy of this position is readily apparent. While it is true that section 189, Revised Statutes of Missouri, 1909, provides that the probate court shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate, yet when we come to examine the nature of plaintiffs' claim, taking it in the view most favorable to plaintiffs and considering their claim as one based upon subrogation, which is a subject cognizable alone in courts which have equitable jurisdiction, we must hold that the probate court has no jurisdiction, [Furnold v. Bank,

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44 Mo. 336, l. c. 338; Petty v. Tucker, 166 Mo. App. 98, l. c. 101, 148 S. W. 142.]

It is a well settled rule in this State that our probate courts have no inherent powers their powers being entirely derivative, and exercise such only as are conferred by or implied from legislation, though it is true that in those matters over which they have jurisdiction they are courts of vast powers. And while these courts, in administering justice in proceedings over which they have jurisdiction, they may apply equitable and also common-law principles in reaching their conclusions, yet they have no common-law or chancery jurisdiction. [State ex rel. Fleming v. Shackelford, 263 Mo. 52, 172 S. W. 347; Lietman's Estate v. Lietman, 149 Mo. 112, 50 S. W. 307; In re Jarboe's Estate, 227 Mo. 59, 127 S. W. 26; State ex rel. Baker v. Bird, 253 Mo. 569, 162 S. W. 119.]

Upon the theory of subrogation plaintiffs can only stand in the shoes of the mortgagee at the time of the death of the decedent, and section 197, Revised Statutes of Missouri, 1909, provides that when a claim is allowed against an estate which is secured by a mortgage, deed of trust, or other lien, held by the creditors, the same may be allowed as other claims but shall not be paid until such security held by the claimant has been exhausted; *but if the security be not sufficient to pay off and discharge the debt of such creditor,* then such creditor, *for the residue of his debt,* shall be entitled in common with other creditors to have the same paid out of the estate. The record in this case is not contradicted but that the amount of the claim of each of the mortgagees was paid off in full by the sale of the property under the deed of trust, which sales were had after the lapse of nine months after the death of the intestate, as provided by statute. So that the mortgagees under the circumstances having had their amounts paid off in full through the sale of the property secured by the deeds of trust, such mortgagees had thereafter no claim whatsoever against the

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estate of the deceased, and therefore the plaintiffs (who the record shows were the purchasers of the property at the foreclosure sale) could have no claim by reason thereof against the estate of the deceased.

When we come to examine section 542, Revised Statutes of Missouri, 1909, which provides that a charge or encumbrance upon any real or personal estate for the purpose of securing the payment of moneys or the performance of any covenants or agreements, shall not be deemed a revocation of any will relating to the estate previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such a charge or encumbrance, we are of the opinion and so hold that unless the will specifically provides otherwise or the intent of the testator is manifest from the instrument itself that real estate devised subject to an encumbrance shall have the amount of the encumbrance paid off out of the assets of the estate, such real estate passes to the devisee subject to such encumbrance.

What we have said above disposes of plaintiffs' claim upon plaintiffs' theory of subrogation. But even though we were to view plaintiffs' claim as in fact a suit to construe the will of the deceased testatrix as to the intentions of testatrix, whether or not the said encumbrances were to be paid off out of funds of the estate, then it is equally clear that the probate court had no jurisdiction; such a suit must originate in the circuit court. [First Baptist Church v. Robberson, 71 Mo. 326.]

We are of the opinion and so hold that plaintiffs' claim is based on the doctrine of subrogation which is clearly a demand for equitable relief and therefore the probate court, as well as the circuit court, properly held that the probate court had no jurisdiction to entertain the claim. The judgment is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

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FRED B. PATTEN, Appellant, v. J. G. MILLER, Respondent.

St. Louis Court of Appeals. Opinion Filed April 2, 1918.

1. **INSURANCE: Life Insurance: Evidence: Illegal Transaction: Case for the Jury.** In an action by an assignee on an instrument for the payment of money given to an insurance agent by an insured, if there is any substantial evidence in the record tending to support plaintiff's theory that such instrument was given for a valid indebtedness, and not as a mere cloak for an illegal transaction, then the case is for the jury.

2. ———: ———: ———: **Rebate of Premiums: Instrument as Cloak: Sufficiency of Evidence.** But, in such action, when plaintiff's evidence shows, without contradiction or dispute, that it was not intended that such instrument evidence a bona-fide obligation of defendant for the unpaid portion of the premium mentioned, but that it was designed merely to serve as a cloak for a rebate in violation of section 6934, Revised Statutes 1909, the trial court did not err in directing a verdict for defendant.

3. **TRIAL PRACTICE: Evidence: Harmless Error.** In such action, permitting the agent, over defendant's objections, to testify as to the amount paid by him to the life insurance company out of the total cash payment to him by defendant, was not prejudicial to plaintiff.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Kent K. Koerner,* Judge.

AFFIRMED.

Berthold & Lister, for appellant.

(1) Where there is any evidence of a material fact in issue, no amount of force in the rebutting testimony will authorize the court to take the question of fact from the jury. Hunt v. Missouri R. Co., 14 Mo. App. 160. If, on all the facts and circumstances, there is room for fair and sensible men to differ in their conclusions,

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the jury should decide. Roddy v. Mo. Pac. Ry. Co., 104 Mo. 234. The weight and sufficiency of the evidence is for the jury. Dooly v. Jennings, 6 Mo. 61; Patterson v. McClanahan, 13 Mo. 507; State v. Upton, 20 Mo. 397; Chouquette v. Barada, 28 Mo. 491; Kirk v. Sportsman, 48 Mo. 383; Moore v. Pieper, 51 Mo. 157; Burham v. St. Louis, I. M. R. Co., 56 Mo. 338; Reynolds v. Rogers, 63 Mo. 17; State v. Peebles, 178 Mo. 475, 77 S. W. 518. (2) The credibility of witnesses is a question for the jury. Glasscock v. Swafford Bros. Dry Goods Co., 106 Mo. App. 657. The fact that plaintiff and defendant are the only witnesses and directly contradict each other does not necessarily render the evidence equally balanced, so that no verdict can be rendered thereon, but the credibility of the witnesses is in such a case wholly a matter for the jury. Utz v. Hoerr, 20 Mo. App. 36. (3) Where there is any evidence tending to support the issues in the case, although slight, it should be submitted to the jury, and it is error to order a non-suit or direct a verdict. Magoon v. Whiting, 1 Mo. 613; Chouteau v. The St. Anthony, 12 Mo. 389; Fine v. St. Louis Public Schools, 39 Mo. 59; Williamson v. Fischer, 50 Mo. 198; Holliday v. Jones, 59 Mo. 482; Flori v. City of St. Louis, 3 Mo. App. 231; Baum v. Fryrear, 85 Mo. 151; Moody v. Deutsch, 85 Mo. 237; Groll v. Tower, 85 Mo. 249; Hadley v. Orchard, 77 Mo. App. 141; Tapley v. Herman, 95 Mo. App. 537; Carr v. Ubsdell, 97 Mo. App. 326; Morrow v. Pullman Palace Car Co., 98 Mo. App. 351; Rosenbaum v. Gilliam, 101 Mo. App. 126. Where there is any evidence tending to prove the issues of fact in a case, it must go to the jury, though the legal effect of the facts is a question of law on which instructions may be given. Bowen v. Lazalere, 44 Mo. 383. Fortune v. Missouri R. Co., 10 Mo. App. 252. A peremptory instruction to find for defendant permissible only when there is no testimony tending to support plaintiff's case. Heman v. Larkin. 70 S. W. 907.

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Holland, Rutledge & Lashly for respondent.

(1) The record proper in this case contains nothing but the petition and fails to show that a motion for new trial was filed and ruled on and that an appeal was taken and a bill of exceptions filed, all of which details are essential before this court will or can pass on the rulings of the trial court. The record proper only is before this court for review and no error can be found therein. State v. Sly, 180 Mo. App. 379; Dalton v. Register Co., 248 Mo. 150; St. Louis v. Young, 248 Mo. 346; State v. Scobee, 255 Mo. 270; Blumer v. Lowenhart, 188 S. W. 1131, l. c. 1132; Fleming v. Meals, 192 Mo. App. 38; Clark v. Clark, 191 Mo. App. 278; Reiner v. Cement Co., 177 Mo. App. 198. (2) The evidence as shown by the document on which plaintiff seeks to recover provided for no date of maturity and the testimony in connection therewith discloses that no interest was to be charged on the money therein specified and thus stamps the transaction as one of rebating a premium. (Record, pp. 2, 26-27). Hoffman v. Ins. Co., 92 U. S. 161, 23 L. Ed. 539; Metropolitan Life Insurance Co. v. People, 209 Ill. 42; Hefron v. Daly, 133 Mich. 613; State Life Insurance Co. v. Strong, 127 Mich. 346; Tillinghart et al. v. Craig, 9 Ohio C. D. 459; Thomson v. McLaughlin, 79 S. E. 182. (3) The evidence establishing rebating in connection with this transaction shows there is no life in the document relied on by plaintiff and no validity or merit to his cause, and the court committed no error in directing a verdict for defendant. Section 6934, Revised Statutes Mo. 1909; Hoffman v. Insurance Co., 92 U. S. 161, 23 L. Ed. 539; Admission Appellant's Brief, p. 50, paragraph 3; See also cases cited under Point 2.

ALLEN, J.—This is an action, instituted before a justice of the peace, wherein plaintiff seeks to recover as assignee of the following instrument, viz:

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"St. Louis, Missouri, November 17, 1911.

"I hereby acknowledge myself to owe and be indebted to S. D. Martin, in the sum of Three Hundred Fifty-seven & 93-100 Dollars, for value received, with interest at the rate of —— per cent per annum, payable annually in advance. To secure the payment of same, I hereby pledge, as sole security, all profits and other benefits now accrued, or that may hereafter accrue, to Policy Number K-17100, issued to me by Meridian Life Insurance Company, and dated November 10, 1911, and I authorize and direct said company to pay S. D. Martin, from such proceeds, the amount shown to be due him. J. G. MILLER."

At the trial in the circuit court, before the court and a jury, the court, at the close of plaintiff's case, gave a peremptory instruction offered by defendant in the nature of a demurrer to the evidence. In obedience to this instruction the jury returned a verdict for defendant, and from a judgment duly rendered thereon the plaintiff prosecutes this appeal.

The evidence shows that plaintiff is the general agent for a life insurance company doing business in the city of St. Louis, and that in the course of his business he had certain dealings with S. D. Martin, a life insurance agent, mentioned in the instrument, supra, whereby Martin became indebted to him, and that as security for such indebtedness the instrument in suit was assigned to him by Martin.

It appears that this instrument was signed by the defendant, Miller, at the request of Martin when the latter delivered to him a policy of insurance on his life in the sum of $10,000, issued by the "Meridian Life Insurance Co.," of which Martin was then agent, upon which policy the annual premium was $421.10. The first annual premium on this policy, it is said, was "settled for" by defendant by the payment to Martin of $63.17 in cash and the execution by him of the instrument sued upon. Defendant did not keep the policy in force after the first year.

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Martin, called as a witness for plaintiff, stated that prior to the issuance to defendant of the policy of insurance he told defendant that he could offer him a policy for which the cash outlay for the first year would be small, "about fifteen per cent," and that defendant would owe him the remainder. He further testified that nothing was said as to defendant's keeping the policy in force after the first year. When asked how defendant's continuance of the insurance after the first year would have affected the instrument sued upon, he said: "Why the company would have taken that off my hands. . . . The company would have taken that up and held it against the policy." When asked if the defendant "would have had to pay this paper" if he had continued the policy after the first year, the witness said: "It would have been paid some day to somebody from Mr. Miller indirectly, because all of the proceeds of the policy come from the policy-holder. . . . If he had kept the policy in force I would have turned it over to the company and Mr. Miller would have paid it. . . . The balance of the policy which Mr. Miller contributed to the company would have done it." He further testified:

Q. "The company would have paid it?" A. "No, sir; his money." Q. "You mean out of certain proportion of the—A. "That goes into the reserve fund." . . . Q. "Out of that reserve this paper would have been paid?" A. "Eventually." Q. "It would have been worked out in the process of the policy?" A. "Yes, sir."

He also testified that defendant was to pay no interest on the indebtedness; that he sent this paper to the Meridian Life Insurance Company, and that the company returned it to him several months later; that on this policy he paid the company $42.11 out of the cash payment received by him all over and above this sum constituting his commission.

The defendant, called as plaintiff's witness, testified that under the agreement between him and Martin

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all that he was to pay for the policy of insurance was $63.17. As to the execution of this instrument he testified as follows: "He (defendant) produced this instrument and asked me to read it. He said that there was a law in Missouri which prevented him from selling any insurance at less than legal rates, and to avoid any liability on his part—he explained that this instrument, which I looked at and read, was given to put him all right with the Insurance Department; it would make it appear as I paid the whole amount; it had no maturity, bore no rate of interest."

The peremptory instruction was given upon the theory that the instrument in suit was executed merely as a device to give the appearance of legality to a transaction involving the rebate of a portion of the premium upon the policy of insurance mentioned, in violation of section 6934, Revised Statutes 1909; and that consequently no recovery may be had thereon, either by Martin or by his assignee, the plaintiff herein. In this we think that the court committed no error. Appellant's learned counsel concede that if it appear as a matter of law that the instrument sued upon was executed and delivered to plaintiff's assignor merely as a means of covering up an illegal rebating of a portion of an insurance premium, then plaintiff has no case. But it is contended that it does not conclusively appear that the instrument was given for such illegal purpose; that the evidence touching the matter was such as to make this question one for the jury.

It is quite true that if there is any substantial evidence in the record tending to support plaintiff's theory that the instrument was given for a valid indebtedness, and not as a mere cloak for an illegal transaction, then the case should not have been taken from the jury. But an examination of all the testimony adduced by plaintiff fails, we think, to show any substantial evidence, of any probative force or value, tending to show that the transaction in question was a valid one. The testimony of defendant, as plaintiff's

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witness, all goes to show that the transaction was one in direct violation of the statute, supra; but we pass this, since plaintiff is not concluded by the testimony of this witness. However, an examination of the testimony of Martin reveals that it was not the intention of the parties that this instrument should constitute any binding obligation on the part of the defendant. While there is a conflict in the testimony of Martin and defendant as to what was said by the former at or about the time of the execution of this paper, such conflict is immaterial here, for regardless of what was then said, the fact is, according to Martin's testimony, that it was not contemplated that the instrument would be paid at all unless the policy were continued in force for a period sufficient to enable this to be done, in some way, out of funds accumulated to the credit of the insured; and defendant was not bound to so continue the policy in force. In other words plaintiff's evidence throughout shows, we think, without contradiction or dispute, that it was not intended that this instrument evidence a *bona-fide* obligation of defendant for the unpaid portion of the premium mentioned, but that it was designed merely to serve as a cloak for a rebate in violation of the statute, supra. In this connection see: Heffron v. Daly, 133 Mich. 613; State Life Insurance Co. v. Strong, 127 Mich. 346.

Error is assigned to the action of the trial court in permitting Martin, over defendant's objections, to testify as to the amount paid by him to the Meridian Life Insurance Company out of the $63.17 paid him by defendant. But it is entirely clear that the plaintiff was not prejudiced by this ruling.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

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OLA E. KLEPPER, Appellant, v. HARRY I KLEPPER, Respondent.

St. Louis Court of Appeals. Opinion Filed April 2, 1918.

1. **HUSBAND AND WIFE: Separate Maintenance: Security.** Section 8295, Revised Statutes 1909, requiring separate maintenance and security therefor, contemplates that the husband shall give such security for the payment of the maintenance allowed the wife as is reasonably necessary to protect her in obtaining the fruits of her judgment.

2. ———: ———: ———. And where the allowance is one payable monthly and the husband's property consists almost wholly of personalty, security for such payments should be required.

3. ———: ———: ———. Under Revised Statutes 1909, section 8295, providing for security for separate maintenance of the wife, the circuit court, at a subsequent term, may require security as to the future payments, although the original decree did not require such security, since the court is empowered to make such further orders as justice may require.

4. **WITNESSES: Expert Witness' Fees: Allowance by Court.** Real estate brokers as expert witnesses are not entitled to demand more than the usual witness fees, and a wife in a suit for separate maintenance could not make a binding contract to pay more than the usual witness fees, but they were entitled to reasonable compensation for such services as examining the property and gathering information and data on which to base their opinions as to its value, and for such expenditures plaintiff was entitled to a reasonable and proper allowance.
   Held, by REYNOLDS, P. J., dissenting, that, if the value of the services of the real estate agents, who examined the property at the instance of appellant, had been before the court, the court could not and should not have made an allowance in favor of appellant for these services.

5. **HUSBAND AND WIFE: Separate Maintenance: Suit Money: Allowance of Expert Witness Fees.** Where a wife in a suit for separate maintenance hired real estate brokers to examine property and appraise it, in the absence of showing of the reasonable value of their services, she was not entitled to an allowance for their fees. Reynolds, P. J., dissenting as above.

6. ———: ———: **Attorneys' Fees: Allowance.** The matter of the allowance of counsel fees to a wife in a suit for separate maintenance is one resting largely in the discretion of the trial court,

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and while this discretion is judicial, and subject to review, the appellate court cannot direct a larger allowance unless it appear that such discretion was abused, or that the allowance is so manifestly inadequate as to amount to a denial of plaintiff's right in the premises.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Wilson A. Taylor,* Judge.

REVERSED AND REMANDED (*with directions*).

R. P. & C. B. Williams for appellant.

(1) The husband, the defendant in this case, should have been required to give security for the maintenance, his property consisting almost entirely of personalty, and, therefore, constituting no security for the judgment. R. S. 1909, sec. 8295; Smith v. Smith,—Mo. App.—, 180 S. W. 568. (2) Where the husband files a petition in a divorce action after final decree, praying for a reduction of the amount allowed as alimony, it is proper for the court to allow the wife a reasonable sum for counsel fees and expenses in defending the application. Smith v. Smith, 151 Mo. App. 649; Smith v. Smith, 164 Mo. App. 439. (3) The allowance of only $50 made in this case for counsel fees was inadequate, considering the questions involved, and the fact that the husband was worth at least $150,000, and the fact that the wife had no income or separate estate except the $225 per month which was allowed her for maintenance and support, and not to litigate with. Klepper v. Klepper, 193 Mo. App. 146. (4) It was inconsistent for the trial court to allow plaintiff attorney's fees for resisting the motion to reduce the maintenance and refuse to allow plaintiff's other expenses necessarily incurred in defending such application.

Muench, Walther & Muench for respondent.

(1) The original decree in this case did not require the giving of security for the installments of

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alimony allowed, nor did the petition therein pray for the same. In these circumstances, the burden is upon appellant to show why such a requirement should be imposed now. It can only be done on proof of new facts. Deidesheimer v. Deidesheimer, 74 Mo. App. 234; West v. West, 94 Mo. App. 683, 686; State ex rel. v. Rainey, 134 Mo. App. 722, 725. (2) The amount, if any, to be allowed appellant for counsel fees in defending respondent's motion was entirely within the discretion of the trial court, before which the services were rendered. McCloskey v. McCloskey, 68 Mo. App. 202; Klepper v. Klepper, 193 Mo. App. 60. (3) An agreement allowing any witness, expert or otherwise, extra compensation for testifying in a case is against public policy and void. Burnett v. Freeman, 125 Mo. App. 683; Same case, 134 Mo. App. 709; Approved in State v. Bell, 212 Mo. 126, 127.

ALLEN, J.—At the April Term, 1915, of the circuit court of the city of St. Louis, the plaintiff herein instituted an action against the defendant, her husband, for separate maintenance, which resulted in a judgment awarding her maintenance in the sum of $225 per month. Upon defendant's appeal this court, in November, 1915, affirmed the judgment (see Klepper v. Klepper, 193 Mo. App. 46, 180 S. W. 461). The present proceeding was begun at the October Term, 1916, of the circuit court, by the filing of a motion by plaintiff praying that defendant be compelled to give security for the payment of the maintenance awarded plaintiff by that judgment. In this motion it is averred that defendant is possessed of property of the value of $150,000, consisting of "personalty, such as money, loans evidenced by notes secured by first mortgages on real estate in the city of St. Louis, and stock in different corporations;" that defendant owns no real estate, and could easily dispose of his property and place it beyond the reach of plaintiff's judgment; that plaintiff is apprehensive that defendant will so dis-

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pose of his property and deprive her of the benefit of her judgment; and that defendant is without employment and has no regular occupation or fixed place of abode.

At the same term defendant filed a motion to modify the judgment aforesaid, averring that the maintenance allowed plaintiff thereby is excessive and unreasonable in view of defendant's present financial condition, and praying that the amount thereof be reduced to a proper sum, and that "the sum so ascertained may be commuted and subject to discharge at one time."

Thereafter, and at the same term, plaintiff filed a motion for suit money to enable her to conduct her defense against defendant's motion to modify the judgment. These motions were tried together, and the court having heard the evidence adduced overruled plaintiff's motion to require defendant to give security for the payment of the maintenance aforesaid, overruled defendant's motion to modify such judgment, and allowed $50 to plaintiff's counsel for his services in defending against defendant's motion to modify the decree. From the court's ruling on both of plaintiff's said motions, plaintiff has duly perfected her appeal to this court.

The evidence discloses that defendant's property consists of notes secured by deeds of trust amounting to $33,500; cash on deposit in bank $8300; five shares of stock of a trust company said to be worth about $1450; a one-half interest in the stock of a realty company owning certain vacant land in the city of St. Louis, such interest being worth about $2000; one hundred feet of ground in Clayton, Missouri, worth about $3000; five vacant lots in Chicago, Illinois, worth $300; a lot and summer cottage at Alexandria, Minnesota, worth about $2500; an automobile worth about $1000; and practically the entire stock of a corporation owning property at Locust Street and Garrison Avenue in the city of St. Louis, subject to a deed of trust for $50,000, the total value of which property is variously estimated by witnesses at from $75,000 to $100,000. Ac-

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cording to the evidence adduced defendant, who is not actively engaged in business, resides at a hotel in the city of St. Louis, but spends at least a part of the summer in Minnesota and during the winter is frequently away on hunting trips.

The evidence showed that there had been no substantial change in the character of defendant's "holdings" since the rendition of the judgment, supra. It appears that at the time of the hearing upon these motions he owned the same property that he owned in 1915, with the exception of immaterial changes in respect to his loans secured by deeds of trust, and the fact that a secured note had been collected in the meantime, defendant having the proceeds in bank.

I.

It is argued for plaintiff, appellant here, that under the statute, viz., section 8295, it was the duty of the court to compel defendant to give security for the payment of the maintenance previously allowed her by the judgment, under the circumstances shown in evidence. On the other hand it is respondent's contention that since the original judgment did not require the giving of such security, an order requiring this to be done cannot now be made except upon a showing of "some new condition not existing or contemplated at the time of the original hearing."

The statute, section 8295, supra, provides as follows:

"When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require, and compel the husband to give se-

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curity for such maintenance, and from time to time make such further orders touching the same as shall be just, and enforce such judgment by execution, sequestration of property, or by such other lawful means as are in accordance with the practice of the court."

It is quite apparent that the statute contemplates that the husband shall be required to give such security for the payment of the maintenance allowed to the wife as may be reasonably necessary to protect the latter in obtaining the fruits of her judgment. And where, as here, the allowance is one payable monthly, and the husband's property consists almost wholly of personalty, security for such payments should be required. In this connection see Smith v. Smith 192 Mo. App. 99, 180 S. W. 568. It cannot be doubted, we think, that the court ought to have sustained plaintiff's motion to require such security to be given, provided the court had the power to do so at a subsequent term upon the showing made. As to this the cases cited by respondent, viz. (Deidesheimer v. Deidesheimer, 74 Mo. App. 234; West v. West, 94 App. 683, 68 S. W. 753; State ex rel. v. Ramey, 134 Mo. App. 722, 115 S. W, 458) did not arise under the statute here involved. In Burnside v. Wand, 77 Mo. App. 382, this court held that where the wife had obtained a judgment for alimony, without any provision as to the giving of security for the payment thereof, the circuit court, under the statutes relating to divorce and alimony, had the power, at a subsequent term, to require the husband to give such security, though no "new conditions" were shown. The language of the maintenance statute, supra, touching the power of the court to make orders in the case subsequent to the rendition of the judgment and after the lapse of the term, differs from that of the corresponding section relating to alimony, and is such, we think, as to dispel any doubt as to the power of the court to make an order such as that here sought by plaintiff. The

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language is that the circuit court "shall order and adjudge such support and maintenance—and compel the husband to give security for such maintenance, *and from time to time make such further orders touching the same as shall be just.*" (Italics ours.) The statute does not in terms provide for an alteration or modification of the original decree, but empowers the court to make such "further orders" as justice may require. We think that it would be an unreareasonable and unwarranted construction thereof to hold that where the decree did not provide for the giving of security the court is powerless to make such an order, though reasonably necessary for the wife's protection, except upon a showing that conditions have changed since the entry of such decree.

We therefore conclude that the trial court was not justified in refusing to compel the defendant to give security for the payment of the monthly installments allowed plaintiff for her support and maintenance, which became due and payable *in futuro*.

II.

Plaintiff complains of the court's ruling on her motion for suit money to enable her to make her defense to defendant's motion to modify the judgment. Plaintiff called as witnesses two real estate brokers who, at plaintiff's instance, had examined the property at Locust street and Garrison avenue above mentioned, and who testified as experts concerning the value thereof. It appears that for their services in making such examination and for testifying plaintiff, through her counsel, had agreed to pay each of them the sum of $50; and there was testimony that this was the reasonable value thereof. It is contended that the court should have made an allowance to cover this expense and ought to have allowed a larger amount as counsel fees.

These expert witnesses were not entitled to demand more than the usual witness fees for giving

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their testimony in the case as witnesses merely; and plaintiff could not make a binding contract to pay them more than the usual witness fees for services as witnesses (Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121; State v. Bell, 212 Mo. 111, l. c. 126, et seq.). But they were entitled to demand reasonable compensation for services which the law does not compel them to render as witnesses for the usual witnesses fees, such as examining the property and gathering information and data on which to base their opinions as to its value (Burnett v. Freeman, supra; State v. Bell, supra). And for expenditures of this character, if reasonably necessary to be incurred and actually incurred in preparing her defense to defendant's motion, plaintiff was entitled to a reasonable and proper allowance. There is nothing in the record, however, tending to show the reasonable value of services of this particular character. And under the circumstances we could not well hold that the trial court committed error, or abused its discretion, in refusing to allow anything for expenses of this nature.

While the allowance for counsel fees appears to be small, we are of the opinion that we cannot properly interfere therewith. The matter is one resting largely in the discretion of the trial court. While this discretion is judicial, and subject to review, we cannot direct a larger allowance unless it appears that such discretion was abused, or that the allowance is so manifestly inadequate as to amount to a denial of plaintiff's right in the premises. No showing was made as to any services rendered by plaintiff's counsel other than those which came under the court's observation in the course of the trial of these motions. And in view of this, and the fact that the motions were tried together, we cannot with propriety hold that the allowance made on plaintiff's motion for suit money to enable her to defend against defendant's counter motion is so meagre as to warrant our interference.

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The court's ruling on plaintiff's motion for suit money is therefore affirmed. As to plaintiff's motion to require defendant to give security, the judgment is reversed and the cause remanded with directions to the circuit court to require defendant to give sufficient security for the payment of the installments of maintenance to become payable in the future. *Becker, J.*, concurs; *Reynolds, P. J.*, concurs in part and dissents in part, as shown by his separate opinion.

REYNOLDS, P. J., (dissenting in part)—While I concur in so much of the opinion as holds that the judgment should be reversed and the cause remanded with directions to the circuit court to require defendant to give sufficient security for the payment of installments of maintenance to become payable in the future, and in approving the action of the court in refusing allowance for the expenditures for the witnesses as to the value of the real estate, and in refusing to allow the attorney a larger fee (although, personally, it seems to me the court could well have allowed the attorney a larger fee than it did), I cannot concur in that part of the opinion which holds that if the value of the services of the real estate agents who examined the property at the instance of appellant had been before the court, the court could and should have made an allowance in favor of appellant for these services. I do not think that the decision of the Kansas City Court of Appeals in Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121, or that of the Supreme Court in State v. Bell, 212 Mo. 111, 111 S. W. 24, warrant this conclusion. On the contrary I think these two decisions are directly opposed to the view here taken by my learned associates. It is clear from those decisions that if the witnesses had claimed these as fees to be allowed them against the respondent, they would not have been allowed. To now allow them in favor of the appellant, as expenses incurred by her, seems to me but an indirect way of allowing

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them to the witnesses. I find nothing in the statute which authorizes any such allowance, and, as I said above, I think the whole trend of the two decisions referred to is against it. For these reasons I do not concur in that part of the opinion.

SUE R. PLEDGE, Respondent, v. LEMMIE C. GRIFFITH, Appellant.

St. Louis Court of Appeals. Opinion Filed April 2, 1918.

1. **CONVERSION: Evidence: Ownership of Bank Stock: Case for the Jury.** Where plaintiff's testimony shows that her money went into the purchase of five shares of bank stock, and that defendant admitted that plaintiff owned five of the shares of stock which came into his possession, obtained her permission to sell them, and after doing so admitted that he held the money in his possession as belonging to her, *held* a case for the jury, though the testimony of plaintiff does not trace her money directly into the five shares of stock, which, she asserted, belonged to her and which were sold by defendant.

2. ———: ———: **Admissions of Infant.** Such admissions of defendant were admissible against him, though he had not attained his majority when the admissions were made.

3. ———: **Infants: Liability for Conversion.** If a minor retained and converted to his own use the proceeds of a sale of stock belonging to plaintiff, his plea of minority would not shield him from liability to plaintiff therefor.

4. ———: **Ownership of Bank Stock: Evidence: Admissibility.** In a suit to recover part of the proceeds of bank stock sold, plaintiff claiming that she owned five shares of such stock, the court improperly refused to permit the defendant's mother to testify that plaintiff did not claim to have furnished any of the money which went into the stock purchased.

5. ———: **Instructions: Damages: Measure of Damages.** In such action, where the petition averred and the proof showed that the stock claimed by plaintiff was sold for $600, and there was no evidence that defendant had received any dividends thereon, an instruction that if the jury found for plaintiff to assess the amount of her recovery at such a sum of money as they might find defendant received for the five shares of stock, not to exceed $750, with interest thereon, was erroneous.

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6. **TRIAL PRACTICE: Improper Remarks of Counsel: Failure of Court to Reprimand: Error.** Where plaintiff's counsel in addressing the jury stated: "Yes, he (defendant) takes the very money he collected with the consent of this now aged woman—young and vigorous that he is, the only heir as the testimony goes in this case, of Mrs. Griffith, to I forget how many acres they said was in that farm, the only heir, and he takes this money and buys another farm and uses it, and then looks you in the face and pleads the 'baby act' and don't deny it—", *held* that such argument was improper, and, after objection thereto, the court should have promptly taken steps to reprimand counsel, and required that the remarks be withdrawn, and to instruct the jury to disregard same to alleviate the baneful effect of such argument.

Appeal from the Circuit Court of Pike County.—*Hon. Edgar B. Woolfolk,* Judge.

REVERSED AND REMANDED.

J. E. Thompson, R. L. Motley and *Hostetter & Haley* for Appellant.

Pearson & Pearson for respondent.

ALLEN, J.—Plaintiff's petition alleges that plaintiff "formerly owned some shares of stock in the Farmers State Bank, of Bristow, Oklahoma; that they were held for her in the name of her brother, J. A. Pledge, now deceased; that in the fall of 1910 she authorized Lemmie C. Griffith (defendant) to sell the same for her; that he did sell the same and received therefor the sum of $600, and the accumulated dividends on said shares of stock, the exact amount of which the plaintiff says she does not know, but which she alleges to be $150; that defendant has refused to turn over to her the proceeds of the sale of said stock and accumulated dividends, although often requested to do so; that he has paid to her the sum of $36 for which he is entitled to a credit." Judgment is prayed for $750 with interest "from date of demand, to-wit, the ——day of——, 1910, less credit of $36."

The answer first contains a general denial and then sets up that for many years prior to the time

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when defendant attained his majority, J. A. Pledge was the curator of defendant's estate and had possession of funds belonging to defendant amounting approximately to $3500; that J. A. Pledge, as such curator, used funds of defendant in his hands in the purchase of twenty shares of stock of the bank mentioned in the petition, taking the certificates in his own name; that in the fall of 1910, while defendant was a minor, J. A. Pledge, being desirous of settling with defendant as curator, sold said twenty shares of stock and delivered the proceeds to defendant in part settlement with defendant as curator. It is further averred that all of the transactions above mentioned took place while defendant was a minor; and that defendant was a minor "at the time plaintiff alleges the contract between her and this defendant was made, and that the proceeds of the sale of this bank stock were used by this defendant, and that this defendant is in no manner liable to plaintiff in any sum."

The trial, before the court and a jury, resulted in a verdict and judgment in favor of plaintiff in the sum of $717, and the defendant appeals. After the case reached this court plaintiff died, and the cause has been revived in the name of her administrator, E. G. Pledge.

Plaintiff, Sue R. Pledge, was an aunt of the defendant, being a sister of defendant's mother, Mrs. Griffith. She is frequently referred to in the testimony as "Aunt Sue." J. A. Pledge, who died in 1913, was a brother of plaintiff and of defendant's mother. He is referred to as "Uncle Arch." He was the curator of an estate belonging to defendant, his nephew, then a minor and who did not attain his majority until April 24, 1911. It appears that prior to 1903 all of these persons lived together as members of one family at the Griffith home in Pike County, Missouri. It is said that in 1903 J. A. Pledge went to Oklahoma intending to remain there permanently, though he made frequent trips to Pike County; and

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that in October, 1904, the other persons mentioned also moved to Oklahoma where they lived until August, 1905, when they returned to this State. It is said that Pledge did not again take up his residence in Missouri until some time in 1909, although he went "back and forth" in the meantime. After his return all of the said persons again resided together in Pike County, at the Griffith home, until after defendant became of age in 1911.

J. A. Pledge made some investments in Oklahoma. Whether or not he had funds of his own invested there is not clear. The evidence shows, however, that he had in his hands moneys belonging to plaintiff and her sister, Mrs. Griffith, as well as funds belonging to his said ward; and that he was supposed to have purchased stock of the First State Bank of Bristow, Oklahoma, for plaintiff and her sister, as well as for the defedant, his ward. In December, 1910,—J. A. Pledge being then, it is said, in failing health—defendant and Senator W. J. Buchanan, cashier of a bank at Eolia, Pike County, went to Oklahoma for the purpose of "looking after" J. A. Pledge's business, "in trying to get a line on it." Defendant and his companion found, at the Bristow bank in Oklahoma, in a certain box, certificates for twenty shares of stock of said bank, of the par value of $100, issued to J. A. Pledge. This stock and certain other papers of Pledge were brought back to Eolia. It was found also that Pledge had on deposit in the bank at Bristow between twelve hundred and thirteen hundred dollars. This money was withdrawn on a check executed by Pledge, and was turned over to the defendant. The certificates of stock mentioned were indorsed by Pledge and were sold by defendant through Senator Buchanan to E. L. Jones, cashier of the Bristow bank, in January, 1911, defendant receiving $2400 therefor. It is plaintiff's contention that five of the shares of stock thus sold belonged to her, and that she is entitled to recover the proceeds of the sale thereof.

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Plaintiff testified that her brother, J. A. Pledge, invested for her $675 which she placed in his hands, and that he purchased with it five shares of bank stock in Oklahoma; that he "looked after her business," and that she "left everything to him." This she thought was in 1902 or 1903. She said that her brother, upon one occasion, gave her $60 which purported to be a dividend upon the stock. She testified that shortly before defendant sold the twenty shares of stock mentioned above, she had a conversation with her brother, J. A. Pledge, in regard to selling her portion thereof, and later a conversation with her nephew, this defendant, in regard to the matter. As to this latter conversation she testified: "He (defendant) told me he was going to Oklahoma to look after his Uncle Arch's affairs down there, and he said if he could, he wanted to sell the bank stock, and he said: 'Aunt Sue, you had better sell yours.' And I said: 'No Lemmie, I don't want to sell mine.' 'I am getting a dividend that is pretty good.' 'I don't think I will sell it now.' And so he didn't insist on saying anything more about it until after he came back.'" And she testified that after defendant returned from Oklahoma he had a further conversation with her and said: "Aunt Sue, I think you are making a mistake, you ought to sell your bank stock. 'It would make mother feel better if you would sell them both together;' that he said that he was 'on a deal with Mr. Jones, cashier of the bank;'" and that she thereupon said: "Lemmie, if you think its best, of course sell it, . . . your Uncle Arch turned it over to you and you can sell it;" and that defendant said: "All right." She further testified that defendant afterwards told her that he realized $600 for the five shares.

Plaintiff's further testimony is that after defendant had reported to her that the stock had been sold, he told her that Senator Buchanan would lend her money at six per cent, to which she objected, saying: "I

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think I can loan it;" that later defendant came to her and said that he would like to borrow the money, and that he would give her a good note and six per cent. interest, and that she agreed to do this; that thereafter she frequently requested defendant to give her the note, and he repeatedly promised to do so, but that she did not succeed in obtaining a note and did not receive any money from defendant with the exception of $5 with which to purchase some medicine and $26 to pay for some dental work.

On cross-examination plaintiff testified that she never saw the certificates of stock that her brother bought with her money; that her brother invested $675 for her sister, Mrs. Griffith, at the same time, but that she did not know whether her sister ever "got any of her money back." When asked if the bank stock bought for her and her sister was not sold by J. A. Pledge in 1907, she answered in the negative. When further asked if she did not know that her brother sold some bank stock in 1907, she said: "That was Lemmie's." She was asked if her money and that of her sister was not used in making the first purchase that her brother made of any bank stock in Oklahoma and she replied that that was her understanding—though she could not tell just when it occurred. She said that she knew nothing about any subsequent purchase of bank stock by her brother.

Senator Buchanan, called as a witness for plaintiff, testified concerning his trip to Oklahoma with defendant in December, 1910, the finding of the certificates for the twenty shares of stock mentioned above, the sale thereof to E. L. Jones, and the obtaining by defendant of the money on deposit in the Bristow bank to the credit of J. A. Pledge. He further testified that in a conversation with defendant in regard to selling the twenty shares of stock when E. L. Jones offered $120 per share therefor, the defendant told the witness "that he didn't know about Aunt Sue's five shares, whether she wanted to sell it, she might want

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to keep it and use the dividends from it, but he wasn't prepared to answer that day;" but that later defendant told him to "go ahead and sell the stock." When asked if defendant told him how many shares of stock Aunt Sue had, he answered: "Five shares, he said." He stated that this occurred after his return from Oklahoma.

This, in substance, is the testimony in chief in behalf of plaintiff.

Defendant introduced the deposition of E. L. Jones, cashier of the First State Bank of Bristow, Oklahoma. By this witness it was shown that on or about March 13, 1905, certificates of stock of that bank were issued to J. A. Pledge, as follows, viz., certificates No. 36 for forty shares, certificate No. 37 for twenty shares, and certificate No. 38 for twenty shares—all of the par value of $25 each. The witness identified a check, which was attached to the deposition introduced in evidence at the trial, drawn upon the Bristow bank, signed by J. A. Pledge and payable to W. E. Jones for $2500, as being the check given by Pledge in payment for the said stock thus acquired by him. And the witness testified that on February 4, 1908, after Oklahoma had been admitted to statehood, the certificates, Nos. 36, 37 and 38, supra, were surrendered, and in lieu thereof there were issued to J. A. Pledge three certificates, Nos. 31, 32 and 33, for ten shares, five shares and five shares respectively, of the par value of $100 each. And it was shown by this witness that the last-mentioned certificates were, on December 22, 1910, assigned by J. A. Pledge to W. J. Buchanan, and on January 17, 1911, were assigned by W. J. Buchanan to E. L. Jones, who purchased them.

Defendant also introduced the deposition of M. Jones, president of the First State Bank of Bristow, Oklahoma. This witness, when asked how much stock of that bank J. A. Pledge had owned, answered: "He at one time owned one hundred and twenty shares and afterwards sold forty shares back to me." He further

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stated that Pledge at one time was the owner of certificate "No. 23," which represented the forty shares which the witness afterwards purchased from him.

Defendant introduced in evidence certain settlements made by J. A. Pledge, as curator of defendant's estate. The last of these settlements, made August 11, 1910, showed a balance due defendant of $3456.47.

As a witness in his own behalf, defendant testified that the twenty shares of stock mentioned above were purchased with his money, while he and the other parties mentioned were living together in Oklahoma in 1905. He testified that his mother and father borrowed from his uncle some money belonging to defendant, securing the same by a certain farm; that later this money was loaned out by his mother for a time, through a bank at Clarksville, Missouri, and was repaid to her by a draft, shown the witness, for $2650, of date February 16, 1909; and that this draft was turned over to his curator who used $2500 of the proceeds in purchasing the bank stock afterwards exchanged for the twenty shares above mentioned. He testified also that he knew that there had been a previous purchase of stock of the Oklahoma bank by his uncle to the extent of $1000 par value, but did not know, of his own knowledge, "whose money had gone into that."

In regard to his conversation with Senator Buchanan defendant testified, in substance, that prior to going to Oklahoma he told Senator Buchanan it was his understanding that there were thirty shares of bank stock in Oklahoma, twenty of which belonged to him, and the other ten to plaintiff and defendant's mother. He declared that after his return from Oklahoma—having discovered but twenty shares—he did not tell Senator Buchanan that it would be necessary to consult plaintiff about the selling of such stock, but that he said that he wanted to consult his mother. His testimony is that he did not consult plaintiff in regard to selling the twenty shares of stock; that his

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uncle had told him in the presence of his mother and plaintiff that the twenty shares belonged to him; that plaintiff did not claim to own any of the stock until some weeks after it had been sold; and that when plaintiff asked him, at different times, to give her a note he always declined to do so upon the ground that he did not owe her anything. He admitted that after the sale of the stock he gave plaintiff $5 upon one occasion and $22 or $24 upon another, for the purposes mentioned by her in her testimony, but he said that these were mere gifts. He further stated, on cross-examination, that long after the stock was sold, his uncle, J. A. Pledge, came to him and endeavored to get him to sign a note for "Aunt Sue;" but that he told his uncle that he didn't owe plaintiff any money. His testimony, as well as that of other testimony in the case, shows that the proceeds of the sale of the twenty shares of stock were invested by him in a farm.

Defendant also testified that he received about $1250 which was on deposit in the Bristow bank to the credit of J. A. Pledge, though it appears that in giving his deposition prior to trial defendant stated that he and his mother received the money; and that he received "other property" found in Pledge's name in Oklahoma.

Mrs. Griffith, defendant's mother, was called as a witness for defendant. She testified that her brother, J. A. Pledge, bought "a thousand dollars worth" of the stock of the Bristow bank for her and her sister, this plaintiff; and that her brother never accounted to her for any part of her money. This witness stated that the stock purchased with her money and that of plaintiff was acquired in 1904, and that her brother sold it in 1907; but that the witness never received any portion of the proceeds.

Touching the purchase of the eighty shares of stock in 1905, which were afterwards exchanged for the twenty shares of stock sold in 1911, this witness said that she and her husband borrowed from J. A.

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Pledge $2500 which the latter had in his hands as defendant's curator, giving therefor a note secured by a mortgage upon a farm; that the farm was afterwards sold and the witness made a loan of the money through a bank in Clarksville, Missouri. She further testified, without objection, that in February, 1905, when the note which she held for this money became due, her brother, J. A. Pledge, said: "I think I can do better down here with it, I think I can get bank stock, and if you do I think I can get more interest on it;" and that thereupon the witness procured from the Clarksville bank a draft for the money, which she delivered to Pledge. This draft, for $2650, dated February 16, 1905, payable to the order of Mrs. Mary G. Griffith, and bearing the indorsements of Mrs. Griffith, J. A. Pledge, and the Bristow bank, was put in evidence.

This witness further testified that she heard a conversation between plaintiff and the defendant in which plaintiff demanded of defendant a note for her money; that defendant denied that he had any money belonging to plaintiff, and refused to give her a note; that plaintiff then said: "Well, you agreed to," and that to this defendant replied: "I can't help it, its mine, Uncle Arch told me it was mine, and I can't help it."

I

It is argued that the court erred in refusing to peremptorily direct a verdict for defendant. Because of this insistence we have set out the evidence, supra, in much detail; and we think that it cannot be doubted that the evidence adduced made the case one for the jury. While the testimony of plaintiff does not trace her money directly into the five shares of stock, which, she asserted, belonged to her, and which was sold by defendant, her testimony shows that $675 of her money went into the purchase of five shares of stock of the Bristow bank; and that defendant admitted that she owned five

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of the shares which came into his possession, obtained her permission to sell them, and after doing so admitted that he held the money in his possession as belonging to her. Though defendant had not attained his majority his said admissions, as testified to by plaintiff, were admissible against him. [See 1 R. C. L. 488; 14 R. C. L. 282; Atchison, etc., Ry. Co., v. Potter, 60 Kan. 808; Chicago City Ry. Co., v. Tuohy, 196 Ills. 410.]

The testimony for plaintiff was sufficient to make out a *prima-facie* case against the defendant; and the *prima-facie* case, so made, was not entirely overthrown and destroyed by the evidence adduced in behalf of defendant, which depended for its vitality and force upon the oral testimony of defendant's witnesses. [See Gannon v. Gas Light Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.]

In any view of the case, the contention that the evidence touching the matter conclusively established the fact that plaintiff's money did not go into the purchase of any of the twenty shares of stock sold by defendant in 1911, but went into an earlier purchase of stock which was sold in 1907, cannot, we think, be sustained. It is true that the evidence in defendant's behalf tends to show that in February, 1905, $2650, which belonged to defendant's estate then in the hands of his curator, was paid to Mrs. Griffith by the draft mentioned above; that this draft was turned over to J. A. Pledge, defendant's curator, and by him deposited in his account in the Bristow bank; and that within a short time thereafter Pledge issued a check for $2500 on this same bank by which he purchased eighty shares of the stock of the bank, of the par value of $25 each, which stock was afterwards exchanged for the twenty shares sold by defendant in 1911. But, aside from the draft and the check mentioned, this evidence consisted of the oral testimony of the defendant and his witnesses, not admitted to be true; and it was for the jury to believe

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or disbelieve such testimony. Assuming that the $2650 so deposited by Pledge was defendant's money, it cannot be said to have been conclusively shown that the $2500 which Pledge afterwards checked out in payment for the stock mentioned consisted of funds belonging to defendant. And the manner in which the stock was divided and held by Pledge, in the three certificates, was in keeping with plaintiff's theory that one-half of it was acquired with money belonging equally to her and her sister.

Likewise the contention that plaintiff's money was invested, together with that of her sister, in 1904, in the purchase of forty shares of the stock of this bank (of the par value of $25 each), which was sold by Pledge in 1907, has nothing definite to support it except the testimony of defendant's mother. From the deposition of M. Jones it appears that in addition to the stock which afterwards became the twenty shares sold by defendant, J. A. Pledge at one time owned forty shares of stock of this bank, (of the par value of $25) represented by certificate No. 23, which the witness purchased from him. But though there is this reference to certificate No. 23, it was not shown when Pledge acquired the stock represented by it, nor when Jones purchased it from him.

It is also true that plaintiff testified that it was her understanding that her money was invested in the first purchase of stock of the bank made by Pledge; but her testimony as a whole touching that matter was not such as to constitute a conclusive admission that her money went into the purchase of stock other than that found in her brother's name in December, 1910, and which defendant sold in January, 1911.

And if in fact defendant retained and converted to his own use the proceeds of the sale of stock belonging to plaintiff, under the circumstances shown in evidence, his plea of minority would not shield him from liability to plaintiff therefor. [See 22 Cyc., p. 618, et seq.]

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We think that the trial court did not err in refusing to take the case from the jury.

II.

There are numerous assignments of error predicated upon rulings of the court, adverse to appellant, with regard to the admission of testimony. It is unnecessary to consider all of them. We think that it cannot be doubted that certain rulings complained of, and to which exceptions were duly saved, were erroneous, and prejudicial to defendant. It appears that the court unduly restricted defendant's counsel in his cross-examination of plaintiff, but this need not be dwelt upon. And the court, we think, likewise confined the evidence regarding the affairs of J. A. Pledge, and his dealings with defendant's property, within too narrow bounds. Though it be true that under the pleadings, and theory upon which the case was tried, the crucial question of fact for determination was whether or not plaintiff's money went into the purchase of the five shares of stock in controversy, nevertheless, under the circumstances, the evidence could with propriety take a rather wide range, particularly in view of the fact that it was shown that J. A. Pledge handled funds and made investments for defendant, plaintiff and plaintiff's sister, as though he were dealing with his own property.

Again the court—improperly we think—refused to permit defendant's mother to testify that plaintiff did not claim to have furnished any of the money which went into the stock purchased in 1905. Testimony of this character, by a witness who had been intimately associated with plaintiff, was not incompetent or wholly irrelevant.

In many instances general objections of plaintiff's counsel were sustained and there is nothing to indicate the theory upon which the court proceeded in making its rulings. It would unduly extend the opinion to discuss these questions in detail. It is sufficient

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to say that in the particulars noted above, at least, the court's rulings cannot be sustained.

III.

Plaintiff's second instruction, of which complaint is made, told the jury that if they found for plaintiff to assess "the amount of her recovery at such a sum of money" as they might find from the evidence defendant received for the five shares of stock, not to exceed the sum of $750, together with interest thereon, etc. This was error, since the petition avers and the proof shows that the stock claimed by plaintiff was sold for $600; and there was no evidence that defendant had received any dividends thereon. Whether or not this would constitute reversible error, in view of the amount of the verdict, we need not say. Neither need we consider the assignment of error that the verdict is, in any event, excessive.

IV.

Another assignment of error relates to the remarks of counsel for plaintiff in addressing the jury. Much of the argument of plaintiff's counsel is set out in the record, but we need only refer to the following portion thereof, viz: "Yes, he (defendant) takes the very money that he collected with the consent of this now aged woman—young and vigorous that he is, the only heir as the testimony goes in this case, of Mrs. Griffith, to, I forget how many acres they said was in that farm, the only heir, and he takes this money and buys another farm and uses it, and then looks you in the face and pleads the 'baby act' and don't deny it.—"

That the fervor of plaintiff's learned counsel, in his zeal for his client's cause, carried him beyond the limit of proper argument, to the prejudice of defendant, cannot, we think, be doubted. An objection thereto was sustained, but defendant excepted to the failure

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of the court to reprimand counsel and require that the remarks be withdrawn, and to instruct the jury to disregard the same. We regard it as clear that the court should have promptly taken steps of this character in order to alleviate, so far as possible, the baneful effect of this argument.

The judgment must accordingly be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

FAIRBANKS, MORSE & COMPANY, a corporation, Respondent, v. MERCHANTS & CONSUMERS MARKET HOUSE ASSOCIATION, a corporation, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 6, 1918. Opinion Filed April 2, 1918.

1. **EVIDENCE: Knowledge of Principal of Acts of Agent: Architects Receiving Deposits: Case for the Jury.** Evidence examined and *held* that there is substantial evidence in the case sufficient to submit to the jury, and to warrant the finding that the promoter and afterwards president of defendant company, had knowledge that architects employed by him and later by the defendant were receiving bids by contractors and requiring a guaranty deposit to be returned if the bid was not accepted.

2. **———: Depositions: Admissibility of Evidence: Fixing Date of Incident.** The objection to a question and answer in a deposition that the time of a stated conversation between witness and defendant company's president was not fixed, was properly overruled, where the subsequent portion of the deposition fixed the time.

3. **———: Harmless Error: Depositions: Conclusions.** The conclusion expressed by a witness in his deposition that he knew that defendant company's president knew of the exaction of guaranty checks from bidders was harmless, where the witness fully stated the facts on which the conclusion was predicated.

4. **CORPORATIONS: Principal and Agent: Agency: Acts of Promoters: Corporate Liability.** A corporation, formed August 6, 1914, and electing a promoter president August 25th, thereafter, who

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owned practically all of the stock, which promoter being under contract with another promoter and member of a firm of architects authorized to receive bids for the construction of a corporation building, to transfer a large part of the stock to him and others and put them in charge of the corporation, constitutes such acts as to charge defendant corporation with responsibility for the acts of such promoters, and render it liable for the failure of such firm of architects to return to a bidder a certified check received August 14, 1914, upon rejection of such bid.

5. ———: ———: ———: **Evidence: Agency of Architects.** Evidence *held* not only sufficient to sustain the charge of the petition that such firm of architects were agents of defendant and to show actual agency, but in point of fact a participation as one of the promoters in the transaction.

6. **INSTRUCTIONS: Variance.** An instruction *held* not to proceed on the theory of ratification of unauthorized act of architects in receiving bidder's guaranty deposits, thus constituting a departure from the theory of the case defined in the petition.

7. **PRINCIPAL AND AGENT: Authority of Agent to Bind Principal: Builders: Agency of Architects.** Although in general a builder is not liable for the architect's failure to return guaranty checks on rejection of bids, yet it may be shown that architects were acting for the defendant corporation in such a manner as to bind the corporation.

8. **EVIDENCE: Transactions with Others: Admissibility.** In an action to recover bidder's deposit held by defendant's architects after rejection of bid, the admission of evidence of another bidder's transactions with these architects, *held* not error.

9. ———: **Newspaper Article: Admissibility.** In such action, a newspaper article concerning the building to be erected, facts for which were gathered from the architects to whom defendant's promoter referred the reporter for information, *held* properly admitted.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Karl Kimmel,* Judge.

AFFIRMED.

Charles A. Houts for appellant.

(1) The petition charged an actual agency existing between defendant and Yoder & Co. Not only was there no evidence of this, but the evidence completely disproved this allegation. (2) The case was sub-

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mitted to the jury on the theory that defendant had ratified the unauthorized acts of Yoder & Co. or was estopped to deny their agency. This was a departure from the theory of the case defined in the petition. Furthermore, ratification or estoppel must be pleaded. Webb v. Allington, 27 Mo. App. 559; Ferneau v. Whitford, 39 Mo. App. 311; McClanahan v. Payne, 86 Mo. App. 284. (3) In the law of agency, there is a clear distinction between an "actual authority" and an "apparent authority" and "ratification" of an assumed authority. St. Louis Gunning Co. v. Wanamaker, 115 Mo. App. 270; Plummer v. Knight, 156 Mo. App. 321. (4) During the beginning of plaintiff's negotiations with Yoder & Co., the defendant was not even in existence. When defendant submitted its bid and delivered its check to Yoder & Co., defendant, though then incorporated, had not held its first meeting of the board of directors and had no officers. Diesing was merely a director and a stockholder. He had no authority to employ architects, and consequently had no authority to ratify their unauthorized acts or estop the corporation by his knowledge. 10 Cyc. 760, 775, 936, 948; 3 Cook on Corps., secs. 712, 727; Bank v. Bennett, 159 Mo. App. 1. (5) Had Yoder & Co. in fact been architects for defendant (which they were not), that fact alone would not have made defendant liable if they exacted and converted checks from bidders; for an architect is not a general agent, his powers being limited to such as are conferred upon him. 6 Cyc. 29, 30. It was plaintiff's duty to inquire and ascertain what authority Yoder & Co. had to act for this defendant. Hodkinson v. Machinery Co., 161 Mo. App. 94. (6) The testimony of the witness Vogel, representing another bidder, of his transactions with Yoder & Co. was not competent. These transactions were not known to plaintiff, nor to defendant, nor to Diesing. Hence, plaintiff did not rely upon them, nor can

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defendant be charged with any responsibility for them. (7) The article published in the St. Louis Republic, in which it was said defendant intended commencing work on the market house therein described, of which C. B. Yoder & Company were said to be the architects, should not have been admitted in evidence. It was "hearsay evidence," and highly prejudicial. Louisiana Purchase Ex. Co. v. Emerson, 149 Mo. App. 594. (8) Newsome, one of plaintiff's witnesses, was permitted to testify that Diesing "knew" Yoder & Company were using the plans and specifications labeled "Merchants & Consumers Market House Association;" that Diesing "knew" that Yoder & Co. were getting in bids; that Diesing "knew" that the bids were accompanied by checks. This testimony was incompetent and highly prejudicial, because, (a) Such "knowledge" was not limited to a time prior to plaintiff's dealing with Yoder & Company. (b) Such testimony is of a mere conclusion, an opinion. It is (in a proper case, under appropriate pleadings) the province of the jury to determine, from facts in evidence, whether a party "knew" a given fact. 3 Chamberlayne, sec. 2344; Sneed v. Gas Co., 149 Cal., 706; Bailey v. State, 107 Ala. 151; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368; Doyle v. Burns, 123 Iowa, 501; Railway Co. v. Martin, 138 Ala. 531; Coal Co. v. Andrews, 150 Ala. 368; Layton v. Campbell, 155 Ala. 220; Pike Co. v. Granger, 162 Ala. 637; Huyck v. Rennie, 151 Calif. 411; Bush v. McCarty Co., 127 Ga. 308; Taylor v. Brown, 49 Ore. 423; Bonn v. Railroad (Texas), 82 S. W. 808; Winkler v. S. (Texas), 126 S. W. 1134; Dorn v. Cooper (Iowa), 118 N. W. 35; Sneed v. Carrington, 15 Utah, 480; Reese v. Mining Co., 17 Utah, 497; Railroad v. Perkins (Georgia), 51 So. 870; Roehl v. Baasen, 8 Minn. 26; Allen v. Rodgers (N. Y.), 70 Hun. 48; Rucker v. Bolles, 80 Fed. 504; Gutridge v. Missouri Pacific, 94 Mo. 468.

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Henry T. Ferriss for respondent.

(1) (a) Plaintiff's instruction was not a departure from the petition, nor did it submit the case on the theory of ratification or estoppel. Hoppe v. Saylor, 53 Mo. App. 4; Hackett v. Von Frank, 105 Mo. App. 384; Mitchum v. Dunlop 98 Mo. 418; 2 C. J. 435-444. (b) Even if it did submit the case on theory of ratification or estoppel, it would not be a departure from the petition. 2 C. J. 906, sec. 613; Lipscombe v. Talbott, 243 Mo. 1-28; Fahy v. Grocer Co., 57 Mo. App. 73-77; McLachlin v. Barker, 64 Mo. App. 511-26. (2) Notice to Diesing on August 10, 1914, was notice to the defendant—even though he was not formally appointed president until a few days later—and his failure to object at that time or later was competent evidence of an actual agency. 10 Cyc, 1055; Chouteau v. Allen, 70 Mo. 340-1; First National Bank v. Fricke, 75 Mo. 178; Quinn v. American Bankers Assn., 183 Mo. App. 8. (3) The authority of Yoder & Co. to receive certified checks was expressly set forth in the specifications and the evidence shows that the president of defendant company knew that checks were being received. (4) (a) The testimony of Vogel was competent upon the issue whether Yoder & Co. were actually acting as architects for this defendant. (b) The newspaper article was properly received in evidence as an admission by defendant. Jones on Evidence, sec. 270; Edwards v. City, 13 N. Y. Sup. 309. (c) Newsome's testimony as to Diesing's "knowledge" of certain things was in every instance predicated upon facts which Newsome stated and which removed the case from the domain of opinion testimony

REYNOLDS, P. J.—This is an action by the plaintiff, a corporation, to recover from the defendant, a corporation, the sum of $640, with interest and costs.

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It is alleged in the petition that the defendant company was promoted and organized for the purpose of erecting, owning and operating a certain market house on a lot which it acquired on Laclede Avenue, west of Vandeventer Avenue, in the city of St. Louis; that one Newsome and one Yoder, co-partners, doing business under the name of C. B. Yoder & Company, "were authorized by the defendant to act, and they did act, as defendant's architects and agents in preparing plans and specifications for said market house and in soliciting and receiving bids from various contractors and materialmen for the labor and materials necessary in the construction of said building. That the specifications prepared by C. B. Yoder & Company, as architects for said building, provided that all bids for work therein must be accompanied by a certified check of 5 per cent. of the amount of the bid, such checks to be made payable to C. B. Yoder & Company, and to be forfeited in case the successful bidder failed to enter into a satisfactory contract with the owner, i. e., the defendant company, but to be returned if such contract was entered into or if the bid was not accepted. That on or about the 14th day of August, 1914, the plaintiff submitted to said C. B. Yoder & Company, architects for defendant as aforesaid, a bid in writing proposing to furnish and deliver to the defendant for its said market house and to install therein certain electric machinery for a total sum of $12,800, and plaintiffs, further, in accordance with said architects' specifications, deposited with them a certified check for 5 per cent. of the amount of its bid; . . . that said check was deposited with them (C. B. Yoder & Company) upon the understanding that it was to be held by them as a guarantee that plaintiff would enter into a satisfactory contract with the owner, the defendant herein, in case the plaintiff's bid was accepted and that it was to be returned to the plaintiff if its bid was not accepted or, if plaintiff's bid was accepted, when plaintiff should sign a contract with the owner, and further upon the understanding

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that the bids were to be opened and the contract awarded within a week or ten days from said date. That said check was received upon the above terms by said C. B. Yoder & Company, as architects and agents for the defendant, and within the scope of their duties as such, and it thereupon became their duty to hold and to return said check in accordance with said terms and not to cash or deposit said check unless, under the terms of the specifications, it became subject to forfeiture by reason of plaintiff's default."

It is further averred that plaintiff's bid was not accepted by the architects or the defendant within the time specified or at any time and that no contract was ever awarded plaintiff by them, whereby, it is averred, plaintiff became entitled to the return of the check. That plaintiff frequently demanded it or its value of the architects and of the defendant, but the demand had been refused. It is further charged that in point of fact the architects wrongfully converted the check by indorsing and cashing it and using the proceeds thereof ($640) in violation of their agreement and duty in the premises, to plaintiff's damage in the sum of $640, for which with interest it prays judgment.

The answer was a general denial.

On a trial before the court and jury there was a verdict in favor of plaintiff, judgment following, from which defendant has duly appealed.

It appears from the evidence in the case that one Minnie Diesing and her brother Edward Krug were owners of 198 feet of ground on the north side of Laclede Avenue and 150 feet west of Vandeventer Avenue, in the city of St. Louis. Minnie Diesing was the wife of Victor Diesing. Along in May, 1914, one Benefield obtained an option upon this real estate, Victor Diesing acting in the matter in behalf of his wife and brother-in-law. Benefield employed C. B. Yoder & Company, architects and engineers, to prepare plans and specifications for a market house, which Benefield proposed to build upon the lots secured by this option. Yoder & Company proceeded to prepare

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plans and specifications and had them practically completed by about June 1, 1914. The plans were drawn on fourteen pages of Blue Print, upon each sheet of which was stamped,

"Market House
for
Merchants & Consumers Market House Ass'n,
Vandeventer and Laclede Ave.
C. B. Yoder & Co.
Architects and Consulting
Engineers.
2043-44 Ry. Exchange Building,
St. Louis, Mo.
Sheet No. 1 Drawn by W. A. S. Traced by W. A. S. Checked by Order No. 1004."

The specifications consisted of seventeen pages of typewritten matter bound together and labelled,

"Specifications of Market House for
Merchants & Consumers Market House Association
North Side of Laclede Ave., 150 Feet West of
Vandeventer Ave.
St. Louis, Mo.
C. B. Yoder & Company,
Architects & Consulting Engineers,
2043-44 Railway Exchange Bldg.
St. Louis, Missouri."

These specifications were preceded with this matter:

"Specifications of material and labor necessary and required in the erection of a market house for the Merchants & Consumers Market House Association, to be erected on the north side of Laclede Avenue, one hundred and fifty (150) feet west of Vandeventer.

"Plans and specifications prepared by C. B. Yoder & Company, architects and consulting engineers, 2043-44 Railway Exchange Building, St. Louis, Missouri. All bids must be accompanied by a certified check of 5 per cent. of the amount of bid, checks to

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made payable to C. B. Yoder & Company, and will be forfeited to them in case bidder fails to enter into a satisfactory contract; otherwise to be returned when contract is entered into, and proper bond put up. The successful bidder will be required to give bond for at least 50 per cent. of the total contract."

Benefield, apparently, had given up his option before these plans and specifications had been completed and before anything had been done towards promoting the enterprise, and Yoder & Company themselves appear to have undertaken to promote the construction of the market house. They procured one Sanders to secure another option on the property from Diesing. It was while this option was in force that the plans and specifications for the proposed market house were drawn up by Yoder & Company. About August 3, 1914, Diesing, who in the meantime had acquired title to the ground on Laclede Avenue from his wife and her brother, entered into a contract with Newsome, of the firm of Yoder & Company, under which he gave Newsome an option on the property at the price and sum of $20,000, to be paid by Newsome to Diesing, less $100, which had been paid. It was further set out and provided in this option contract between Diesing and Newsome that they were desirous of forming a corporation under the laws of the State of Missouri and of conveying to the corporation the real estate described in the contract, being the 198 feet on Laclede Avenue, before referred to, and it was contracted between them that Newsome should surrender to Diesing the option contract above described; that Diesing, until the organization of the corporation, should hold title to the real estate as trustee for the corporation to be formed, discharged of the option contract, and upon the organization of the corporation Diesing would convey to it, on the terms in the option contract set out, the real estate therein described; that upon the surrender of the option contract Diesing would form, or cause to be formed, a corporation under the laws of the State of Missouri

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relating to manufacturing and business corporations, under the name of Merchants & Consumers Market House Association, having an authorized capital of $125,000, divided into 1250 shares of the par value of $100 each, of which 650 shares, it was provided, should be recited to have been fully paid by the conveyance of the real estate to the corporation, the corporation to have a board of five directors and the articles of association to recite the purposes of the organization, which in the main and briefly, may be said to be to erect and construct a market house and equip, furnish and operate it, leasing spaces in it, and to operate and control it as a market house and engage in general commission business for the sale of meats, food stuffs, provisions and similar commodities. It is further provided that within fifteen days after notification by Diesing that a certificate of incorporation had been granted, Newsome would pay to Diesing the sum of $19,900, and that thereupon Diesing would assign and deliver to Newsome such amount of the capital stock of the corporation as might be necessary for the use of the party of the second part, not exceeding $25,000, and that the remainder of this stock, not less than $40,000, which had been subscribed and fully paid, should be assigned and delivered to parties in the following proportion: 29 per cent. to Newsome, 29 per cent. to Diesing, 30 1/2 per cent. to Benefield, and 11½ per cent to Yoder, and that thereupon Diesing would procure the resignation of at least four of the members of the board of directors named in the articles of association other than Diesing and that the vacancies thus created should be filled at a special election of the stockholders called for that purpose, Diesing to advance all necessary money for payment of notary fees, corporation fees, etc., for which he should be reimbursed by the corporation when incorporated.

In the meantime as also thereafter Yoder & Company solicited and were taking bids for the proposed market house. The representatives of the plaintiff, hear-

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ing of this, on or about August 10th or 11th, 1914, went to the office of the architects to inquire into the matter and to quote a price. According to the testimony of Mr. Dillon who was the manager of the machinery department of plaintiff, and of Mr. Balke, a salesman, who accompanied Mr. Dillon to the office of Yoder & Company, they met Mr. Newsome and asked him whether they were really in the market and proposed to go on with the enterprise. They were informed by Mr. Newsome that he was ready for business "right now;" that the Market House Association had been formed and had the money and proposed to immediately let contracts and go on with the work, and if plaintiff wanted to get in on the proposition they would have to get in their proposal right away. According to the testimony of Mr. Dillon and Mr. Balke, Mr. Yoder was present; seated across from him at a flat-top desk was a gentleman whom they indentified as Mr. Diesing, and Mr. Newsome was there, standing up and carrying on the conversation. Both Mr. Dillon and Mr. Balke were very positive in their indentification of Mr. Diesing as having been present at that conversation about the 10th or 11th of August. The plans and specifications for the proposed market house were there, spread upon the table before the parties present, and that part of them relating to the basement, in which the articles on which plaintiff was bidding were to be located, was examined. Afterwards, on August 12, 1914, submitting its bid, plaintiff also delivered to Yoder & Company, apparently to Newsome of that firm, a certified check for $640, covering 5 per cent. of its bid, as called for in the specifications, the check payable to the order of Yoder & Company, who, in writing, acknowledged the receipt of it. Some days before this, that is to say under date of August 4, 1914, articles of association were drawn up under the general statutes of this State pertaining to manufacturing and business associations, and duly signed and acknowledged. In these articles the

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name of the proposed corporation was given as Merchants & Consumers Market House Association; its capital stock placed at $125,000, divided into 1250 shares of the par value of $100 each, and it is stated that 650 shares thereof had been *bona-fide* subscribed and actually paid in full in real estate, which was in the custody of the persons named in the first board of directors, the real estate being described and stated to be of the actual cash value of $65,000. The names and places of residence of the share holders and the number of shares subscribed by each were stated as follows: Victor Diesing, 646 shares, Minnie Diesing, August Theorner, Joseph F. Lager, Ghio Natoli, 1 share each. These persons signed and acknowledged the articles and were named as the five shareholders who should constitute the first board of directors; the object and purpose of the corporation was stated to be, to erect and construct a market house, etc., all as set out in the contract heretofore referred to between Diesing and Newsome. These articles were filed with the recorder of the city of St. Louis on August 5th, and a certificate of incorporation issued out of the office of the Secretary of State on August 6, 1914. The incorporators and directors, other than Diesing, were his wife, his clerk, and two friends of Diesing. It appears that the first meeting of the board of directors of the new corporation was held August 25, 1914, all the persons named as the first board of directors being present except Lager, whose consent, in writing, to the holding of the meeting was presented and filed. At that meeting Victor Diesing was elected president, Theorner, secretary, and it is recited in the minutes of the meeting that the attention of the board had been called to the fact that the 198 feet of real estate on Laclede Avenue, and stated to be of the actual value of $65,000, had been turned over to the persons constituting the board of directors in payment for $65,000 of the capital stock of the company,

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and the president and secretary were authorized and directed to issue certificates of stock in that amount in exchange for the real estate so conveyed.

Early in August, 1914, and after the articles of association had been filed in the Recorder's office, a reporter for one of the daily city papers called Mr. Diesing up and asked him about the proposed market house. Diesing told the reporter that he was not then ready to discuss the matter with him but to call him up later, which the reporter did. Mr. Diesing then said he was not yet ready, telling the reporter that when they were ready to discuss the matter for publication he would call him up. This he did on September 12, 1914, when the reporter called on him and Diesing went over the matter of the proposed market house and the plan of conducting business in it; told the reporter that they were going to erect it both for a market place and for stores and offices; told him its location and that they were going to begin the following Monday. This interview took place on Saturday and Diesing referred the reporter to Yoder & Company for the details and plans of the building as they had drawn them up. The reporter went to Yoder & Company, getting the information, and on the following day (Sunday) printed an article in his paper to the effect that a new business block was to be erected by the Merchants & Consumers Market House Association on Laclede Avenue west of Vandeventer and that the work was to begin on Tuesday on the site. Diesing had also said, in the presence of a witness, that he intended getting publicity for their project, as it appears that Diesing and Newsome, and possibly others, were negotiating with several parties in St. Louis to underwrite bonds that were proposed to be issued by the company, the proceeds to be used in the erection of the proposed building. For that reason, Diesing said, all the parties in interest desired publicity to be given the enterprise. It further appeared that by a contract of date September 12, 1914, signed by Victor Diesing indi-

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vidually, by Merchants and Consumers Market Association, by Victor Diesing, president, as parties of the first part, and by Newsome, as party of the second part, that Diesing and the corporation granted to Newsome the right to begin and continue until the 12th of October, 1914, the excavation required in the erection of the market house proposed to be erected on the property of the parties of the first part, describing it, "said excavation to be made in accordance with the plans and specifications hereto attached and made a part hereof." By this agreement Newsome agreed to pay the costs of the excavating and it was set out that it was not to be understood that the contract gave to the party of the second part any right to the property except as in the contract set out and that nothing in it was to prevent Newsome from being reimbursed by the Merchants & Consumers Market House Association for his expense in connection with making the excavation, Newsome agreeing to furnish a bond in the sum of $6000 to secure the parties of the first part in the performance by him of the terms of the contract. This excavation was accordingly entered into under the direction of a Mr. Lucas, an employee of Yoder & Company. He was engaged in superintending this excavating for something over a month and it appears to have been commenced about September 12th or 13th, the time of the publication of the article in the public press, which is before referred to. Mr. Lucas testified that he had a little house on a lot adjoining the property on which he was working; that he had in there the plans and specifications and that Mr. Diesing was there during the whole time that the excavating was going on, almost daily, very frequently, and that the plans and specifications referred to were lying there easily to be seen and accessible to anyone interested.

This is a brief resume of the somewhat involved and complicated facts developed at the trial of this case, but sufficient we think, to understand the points here involved.

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The court, at the instance of the plaintiff, instructed the jury as follows:

"If you find from the evidence that on or about August 12, 1914, the firm of C. B. Yoder & Company were acting as architects and agents of the defendant for the erection of a certain market house of the defendant on Laclede Avenue in this city and were receiving bids for work thereon and certified checks in accordance with the plans and specifications offered in evidence; and that the defendant knew they were thus acting as its architects and agents and receiving bids and checks and permitted them to do so without objection or notice to others; and that while thus acting as defendant's architects and with the defendant's knowledge, said C. B. Yoder & Company received from plaintiff a certain bid for electrical machinery for the defendant's said market house and also a certified check in the sum of $640, representing five per cent. of the amount of plaintiff's bid, to be held by said C. B. Yoder & Company as defendant's architects and agents as a deposit and guarantee that plaintiff would enter into a contract with the defendant if its bid was accepted, but to be returned if its bids was not accepted or if it entered into such contract, and that plaintiff's bid was not accepted and no contract was awarded it, but said C. B. Yoder & Company wrongfully cashed said check and has failed and refused to return same or its proceeds to plaintiff, then you will find in favor of the plaintiff."

This was the only instruction given except as to the measure of damage and the number of jurors necessary to concur. Defendant asked no instructions except one tantamount to a demurrer to the evidence and that was refused.

That Yoder & Company, as architects, had solicited and obtained a number of bids for the furnishing, equipment and construction of the proposed market house is not disputed, nor is it disputed that following the specifications they had exacted and had received from all

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the bidders, certified checks, as provided, representing 5 per cent. of the amount of the bid. Nor is it controverted that Newsome, by arrangement with Yoder & Company, on the receipt of these checks, had deposited them, apparently to the credit of himself, and while none of the bids had been accepted and contracts let, the check here involved was not returned to the plaintiff, nor the amount represented by it refunded, nor any contract closed with it.

The first question of importance in the case, as we look at it, is whether Diesing had knowledge of the fact of these checks being exacted and received by Yoder & Company, or by Newsome.

It is true that Diesing denied any knowledge of the matter, but there is substantial evidence in the case sufficient to submit that matter to the jury and to warrant the finding that Diesing was aware of these facts; that is to say, of the exaction of the checks and of their being received and subsequently deposited by Yoder & Company or by Newsome. The testimony of Newsome was taken by deposition and he was asked to state whether, during August and September, 1914, and after Diesing had signed up the contract before referred to between himself and Newsome, Diesing knew that he (Newsome) was getting these bids from various contractors for material. The witness answered, "Yes;" that he was aware that "we were getting bids and had got bids. Yes, sir." This question was asked and the answer made without objection. Newsome was further asked, referring to the contract between himself and his firm, to state what that was, the contract, it appears, having been lost. Newsome testified that he had a contract between himself and his firm, the essence of which was that the certified checks which were exacted from the bidders, were being turned over to C. B. Yoder & Company and that C. B. Yoder & Company gave him (Newsome) permission to use these funds. Newsome further testified that he showed all of these contracts to Diesing. How much attention he paid to them, witness said, he did not know; that

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he showed him what he had in hand, all that he was doing and everything, during the course of negotiations. He was asked whether at that time and during the subsequent course of negotiations he could state whether or not Mr. Diesing knew that Yoder & Company were getting these checks, either from conversations or any other way. The witness answered that Diesing knew those checks had been used to a certain extent from the simple fact that he (Newsome) talked with him one day in regard to returning those checks. Counsel for the defendant objected and asked to have this answer stricken out as to the certified checks being returned "because the time is fixed, if it is fixed at all, long after these checks were received; in other words, after the thing had blown up and every one knew that he (Newsome) had taken the money," and that this answer as to Diesing having been told by Newsome about the checks being returned should "be stricken out . . . because the time isn't fixed; I object to those two (answers) and ask that they be stricken out because the time isn't fixed." The court thereupon directed the next question and answer to be read, when he would rule on the objection. Counsel, reading the deposition, then read the following: "Can you fix the time? A. I can't fix the time. It was after I moved my office into the Wright Building; as to the date, I don't know. . . ." The court then asked to see the deposition and looking at it handed it back and overruled the objection "because of the fact that what follows brings that (the date referred to) to light." This was objected to. It will be noted, therefore, that the only objection that was interposed to this testimony as to the knowledge of Diesing was for failure to fix the time when it occurred, the court holding, and as we think properly, that the subsequent portion of the deposition fixed the time.

It is also true that in answering a question the witness (Newsome) was permitted to answer that he "knew" that Diesing knew about the exaction of these checks and the use that was made of them. That was

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objected to as a mere conclusion. If that answer stood alone, this assignment of error might be well taken, but its admission, in the light of the explanatory testimony of this witness, showing fully the facts on which the conclusion was predicated, rendered it harmless. We say this for the reason that it fully appears from Newsome's testimony that Diesing had full knowledge of the plans, of the requirement that checks accompany all bids, and of the fact that Yoder & Company had so received these checks. There is evidence that Diesing discussed with Newsome the matter of the receipt of those checks and whether or not they should be returned to the bidders. It is argued that this was after the checks had been used by Newsome, and such is the tenor of Diesing's testimony; but Newsome's testimony makes it appear that this occurred while the checks remained in his possession and before he had used them.

The next proposition of importance is, whether this corporation defendant is liable and chargeable with the acts and knowledge of Diesing and with the acts of Yoder & Company, or Newsome. The corporation, not having been formed until August 6, 1914, and Diesing not having been elected an officer—president—until August 25th, it is argued that it cannot be held for these acts. A consideration of all the testimony in the case leads us inevitably to the conclusion that Diesing and Newsome, the latter representing both himself and his firm, were in point of fact the promoters of this defendant organization: were the corporation. Diesing, owning practically all of the stock and being under contract with Newsome to transfer a large part of other shares to him and to others and to put them in charge of the corporation, in our opinion, constitutes such acts as charge the defendant corporation with responsibility for the acts of Diesing and Newsome in connection with this matter. The knowledge of Diesing was that of the defendant. As averred in the petition, Yoder & Company were the agents and representatives in this matter of those who really

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constituted the corporation, and that so effectually as to make the corporation, as such, liable for their acts. So, in effect, the instruction given at the instance of plaintiff told the jury. We see no error in this instruction. We think it was warranted by the evidence in the case and based upon a proper theory as governing the law.

It is said by learned counsel for appellant that the petition charged an actual agency existing between Yoder & Company and the defendant, but that not only was there no evidence of this but the evidence completely disproved the allegation. We cannot agree to this latter proposition. There was ample evidence warranting the jury in finding not only an actual agency but in point of fact a participation as one of the promoters by Yoder & Company in the transaction.

It is further argued that the case was submitted to the jury on the theory that the defendant had ratified the unauthorized acts of Yoder & Company and was estopped to deny that agency and that this was a departure from the theory of the case defined in the petition. We do not understand the instruction to do anything of the kind.

It is also said that Yoder & Company, being architects, even if architects for the defendant, which is denied, that fact alone would not have made defendant liable, if they exacted and converted checks from holders, 6 Cyc. 29, 30, being cited for this. That proposition is correct, but there is substantial evidence in this case to show that Yoder & Company were acting for the defendant corporation, or its real owner Diesing, in such a manner as to bind the corporation.

In the course of the trial the testimony of a witness representing another bidder was introduced as to what had taken place between himself and Yoder & Company in connection with these bids. We see no error in the admission of this testimony.

Another objection to testimony made is to the admission of the article published in the city news-

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paper and above referred to. We hold that this evidence was properly admitted.

The final assignment of error is that Newsome was permitted to testify that Diesing "knew" Yoder & Company were using the plans and specifications labelled "Merchants & Consumers Market House Association," and that Diesing "knew" that Yoder & Company were getting in bids and that they were accompanied by checks. We have noticed this point before and repeat what we there said, to the effect that while it was improper to admit this evidence, its admission was not reversible error when we consider in connection with it the testimony which the same witness gave, much of it without objection, covering the same ground and showing how and why Diesing "knew" and had knowledge of these transactions.

There are a few other points made by way of assignment of error which we do not think necessary to notice.

On consideration of the case we have arrived at the conclusion that the verdict and judgment were for the right party. Finding no substantial error in the conduct of the trial, the judgment of the circuit court should be and is affirmed. *Allen* and *Becker, JJ.*, concur.

MARGARET MOST, Respondent, v. GOEBEL CONSTRUCTION COMPANY, a corporation, Appellant.

St. Louis Court of Appeals. Opinion Filed May 7, 1918.

1. **MASTER AND SERVANT: Injury to Servant: Master's Negligence: Question for the Jury.** In an action by the wife of a servant for personal injuries resulting in his death, where the facts and circumstances appear to afford reasonable inferences of the masters negligent fastening of a chain supporting a scaffold which fell, causing such death, the question of the master's negligence was one for the jury.

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2. ———: ———: ———: **Scaffold-Structure: Construction of Statute.** A platform sixty feet from the ground, supported at one end by chains swinging from the roof, the other end resting on poles running along the side of the building, and furnished by the master for the use of his workmen while erecting or repairing a building is a scaffold or structure within the meaning of section 7843, Revised Statutes of Missouri 1909, which requires all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building, shall be well and safely supported, and so secured as to insure the safety of persons working thereon or passing under or about the same, against the falling thereof.

3. ———: ———: ———: **Question for the Jury.** Under such statute, whether the building on which deceased was employed as a cement finished was being erected or repaired, *held* a question for the jury.

4. **APPELLATE PRACTICE: Review: Demurrer to Evidence.** Where, at the close of plaintiff's case upon the overruling of the defendant's demurrer to the evidence, it introduced no evidence, plaintiff's evidence to sustain his case must be accepted upon review as true, together with all reasonable inferences and deductions which may be drawn therefrom.

5. **MASTER AND SERVANT: Fellow Servants: Cement Finisher and Carpenter not Fellow Servants.** Where the testimony is uncontradicted that deceased was a cement finisher, and was employed in that capacity, and that he had nothing whatsoever to do with the building of a scaffold, nor with hanging or fastening same to the supports on the roof, nor with the moving thereof from time to time as the progress of the work necessitated but that such work was done by carpenters, the deceased was not a fellow servant of the carpenters in the building, fastening, or moving of the said contrivance, though all worked together upon it after it was built and at various times after it was moved from place to place in the progress of the work for men are frequently fellow servants when working in one capacity, and yet not fellow servants with reference to their work in another capacity.

6. **APPELLATE PRACTICE: Harmless Error.** An assignment of error that an instruction given for plaintiff proceeded upon the theory that a chain supporting the scaffold or structure was fastened to the roof, when the petition averred it was negligently attached to a timber on the roof, is purely technical, and without real merit.

7. **DAMAGES: Excessive Damages: Loss of Husband and Father.** Where plaintiff's husband was a cement finished at the time of his decease, and left surviving him plaintiff and their four minor children, a verdict of $7500 is not excessive, although the evidence failed to show what the earnings of deceased were at the time of his death.

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Appeal from the Circuit Court of the City of St. Louis. —*Hon. William M. Kinsey,* Judge.

AFFIRMED.

Leahy, Saunders & Barth for appellant.

(1) The demurrer in this case should have been sustained: (1) Because there was no evidence of defendant's negligence. (2) Because the statute, Sec. 7843, R. S. 1909, which was the sole ground of negligence alleged in the petition, does not apply to a swinging, movable platform like the one in the instant case. It was "transitory" and "shifting" in character and its safety was necessarily committed to the workmen in charge. Livingood v. Lead & Zinc Co., 179 Mo. 229; Anderson v. Missouri Granite & Construction Co., 178 S. W. 737; Deiner v. Sutermeister, 266 Mo. 505, 514-19. (3) Because the *res ipsa loquitur* doctrine does not apply and because it was not pleaded and not relied upon. Section 7843, R. S. 1909; Deiner v. Sutermeister, 266 Mo. 505, 514-19; White v. Montgomery Ward & Co., 191 Mo. App. 268, 270; Williams v. Ranson, 234 Mo. 55, 75; Forbes v. Dunnavant, 198 Mo. 193, 210; Hedrick v. Kahmann, 174 Mo. App. 57. (4) Because Most, decedent, and Clark and his helper, Cordes, who erected the swinging, movable platform, and moved it from time to time, were fellow servants, and the negligence of Clark and Cordes, if admitted, would bar any right of recovery on the part of plaintiff. Henson v. Stave Co., 151 Mo. App. 224, 235; Kellerman v. Telephone Co., 189 Mo. App. 506; Herbert v. Wiggins Ferry Co., 107 Mo. App. 287; Bowne v. Railroad, 95 Mo. 268, 277; Kiffin v. Wendt, 57 N. Y. Sup. 109; Maher v. McGrath (N. J), 33 Atl. 945.

(2) (1) The instruction given for plaintiff on the right of recovery was not based upon the evidence and was outside of the scope of the pleadings and, therefore, was erroneous. It proceeded upon the theory that the chain in question was "fastened to the roof," when

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there was neither proof nor pleading to support it, and the averment in the petition was that the chain was negligently attached to a timber on the top of the roof of the building. (2) The instruction on the measure of damages was erroneous because the only proof in the record was of marriage and death, with a widow and four children surviving. In any event a verdict for seventy-five hundred dollars, based upon this evidence, was grossly excessive.

Bartley & Douglass for respondent.

(1) The court did not err in overruling the demurrer offered by the defendant as the close of plaintiff's case. (a) In passing on a demurrer to plaintiff's evidence the court must consider the evidence introduced by plaintiff as true, and make every finding and deduction in her favor which the jury would have been warranted in making. Meenach v. Crawford, 187 S. W. 879, 882; Williams v. Railroad, 257 Mo. 112, 52 L. R. A. (N. S.) 433; Grouch v. Heffner, 184 Mo. App. 365, 372; Irwin v. United Railways Co., 191 S. W. 1130. (b) If the facts introduced in evidence bearing on the issues are disputed, and admit of different conclusions and inferences it must be left to the jury to decide the question of negligence. Powers v. Transit Company, 202 Mo. 267, 280, and citations; Yost v. Cement Company, 191 Mo. App. 422, 432. (c) Where defendant offers a demurrer to plaintiff's evidence, and stands on it, then the evidence offered by plaintiff to sustain his case, together with all reasonable inferences and deductions to be drawn therefrom, must be accepted as true. Parker-Washington Co. et al. v. Dennison, 249 Mo. 449, 469; Gerardi v. Gardner et al., 255 Mo. 538, 562-3; Clark v. Railroad, 234 Mo. 396, 418. (d) Negligence need not be shown by direct or positive proof, but may be reasonably inferred from the facts and circumstances in evidence, and this is true irrespective of the presumption raised by the *res ipsa loquitur* doctrine. Capehardt v. Murta et al., 165 Mo. App. 55.

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(e) Section 7843, R. S. 1909, includes scaffolds such as the one described in the present case. Williams v. Ransom, 234 Mo. 55; Deiner v. Sutermeister, 266 Mo. 505, 517-18; Jones v. Gamble, 140 N. Y. Supp. App. Div. 733. (f) This section (7843, R. S. 1909) is highly remedial and is to be liberally construed in favor of the safety of the life and limbs of employees, as that is the object of the statute. Session Acts 1917, page 324; See Title Laws: Common Law and British Statutes; Henderson v. Heman Construction Company, 199 S. W. 1045 (not yet reported). (g) Where a statute or ordinance is violated and the failure to comply with such statute or ordinance is the proximate cause of an injury the doctrine of *res ipsa loquitur* applies. Burt v. Nicbols, 264 Mo. 1; Stewart, Admr., v. Ferguson, 164 N. Y. 553; Lorenzo v. Faillare, 132 N. Y. Sup. App. Div. 103; Nixon, by Etc., v. Thompson-Scarrett Co., 131 N. Y. Sup. App. Div. 152. (h) Where the master undertakes the building of a scaffold for a servant to work upon, then this is a non-delegable duty of the master. See McGrath v. Fogel, 182 S. W. 813; Cooney v. Laclede Gas Light Company, 186 Mo. App. 156. And a cement finisher who works on this scaffold is not a fellow servant with the man who built the scaffold. McGrath v. Fogel, 182 S. W. 813, supra. (2) (a) Instruction No. 1 given by the court is a correct declaration of the law. Williams v. Ransom, 234 Mo. 55; See instruction on middle of page 67 given by the court. (b) The instruction on the measure of damages correctly declared the law.

BECKER, J.—This is an action by Margaret Most, widow of Fred Most, against the Goebel Construction Company, a corporation, for damages suffered by plaintiff as the result of the death of her husband, Fred Most, while employed by the defendant company as a cement finisher. Judgment resulted in favor of plaintiff and against the defendant in the sum of $7500 from which the defendant brings this appeal.

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Plaintiff's second amended petition contains appropriate averments as to the relationship of plaintiff to her deceased husband and charges that the Goebel Construction Company is a Missouri corporation. The petition further avers: "On or about the 5th day of August, 1915, the defendant was engaged in repairing a building at or near 3757 Chouteau avenue in the city of St. Louis, and that on said date plaintiff's deceased husband was in the employ of the defendant and engaged in erecting or making repairs on said building, from a scaffold erected and furnished him by the defendant upon which to stand while doing said work; that said scaffold was about sixty feet high and supported by chains or ropes, which swung from the roof of said building, and were attached to said scaffold; that said chains or ropes which supported the scaffold were secured to the roof of said building by passing said chains or ropes through the holes in the roof and fastening them to or around pieces of timber about 4 x 4 x 18 inches, which said timbers were of sufficient size to prevent being pulled through the holes in the roof through which said chains passed, and of sufficient strength to hold said scaffold."

"Plaintiff further says that on said date, while her deceased husband was at work upon said scaffold in the regular scope of his employment, that one of the chains or ropes became unfastened from the piece of timber to which it was fastened as aforesaid, and caused said scaffold to give way with her said husband and precipitate him to the floor below, from which fall he sustained injuries that caused his almost immediate death."

"Plaintiff further says that the death of her deceased husband was directly caused by the negligence of the defendant in this, to-wit: That on the 5th day of August, 1915, and for a long time prior thereto, there was in force in the State of Missouri, section 7843 of the Revised Statutes for the year 1909, as follows, to-wit:

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"All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or near by."

"That at the time the defendant negligently failed to have the scaffold upon which it directed plaintiff's deceased husband to work and which fell and caused the death of plaintiff's deceased husband, well and safely supported and so secured as to insure the safety of her deceased husband while at work thereon, but had one of the chains or ropes which supported the scaffold so negligently fastened to or around the piece of timber aforesaid as to cause it to come loose, thereby causing the scaffold to give way and precipitate plaintiff's deceased husband to the floor, from which he received injuries that caused his death."

"Wherefore plaintiff prays judgment against the defendant for the negligent killing of her husband as aforesaid in the sum of ten thousand ($10,000) dollars, together with her costs." Defendant's answer was a general denial.

The case was tried before the court and jury. At the close of plaintiff's case the defendant offered an instruction in the nature of a demurrer to the evidence, which the court overruled. The defendant stood on its demurrer and did not offer any testimony.

Plaintiff's evidence shows that she is the widow of Fred Most and that there were four children born of the marriage, living at the time of his decease, three boys aged respectively 2, 13 and 18 years, and a girl aged 6 years. That on the day in question plaintiff's husband together with three other men named

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Clark, Menschensky and Propoulenis were working on a so-called scaffold suspended from the ceiling of a building belonging to the St. Louis Independent Packing Company, which so-called scaffold was being used to take down the false work on which the concrete roof had been poured, and to smooth the cement work which formed the ceiling. The cement roof was sustained by large iron beams, the concrete forming the ceiling in between the several iron beams being referred to as panels. The so-called scaffold was first erected and swung from the roof at the east end of the building and as each panel, namely the space between the big iron beams, was fininshed, the so-called scaffold was moved to the next panel west. The so-called scaffold was made of heavy planks, one end of the planks resting on poles running along the side of the building, and the other part of the planks being supported by three ropes attached to three block and tackle arrangements which were suspended from three chains each of which ran thrugh an iron pipe for which an appropriate opening had been left in the concrete which formed the roof. Each of these chains were tied around a piece of wood 4 x 4 x 18 inches which rested for its support on the roof. This so-called scaffold had been built by a carpenter named Clark assisted by one Cordes, and up to the time it fell it had been moved four or five times, each time by said Clark and his helper. There was abundant testimony that the deceased, Most, had nothing to do either with the original constructing of the so-called scaffold nor with the fastening of same to the roof, nor the moving thereof from one panel to another. This so-called scaffold was about thirteen feet in width and thirty-five feet in length and was suspended at a heighth of about sixty feet above the floor or basement of said building, which building had no floors in it so that in the event of the fall of said so-called scaffold there was a drop of sixty feet to the floor or basement. The purpose of the so-called scaffold was to furnish a platform to enable the men to remove the false work or moulds from the concrete ceiling and

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to enable the cement to be smoothed properly and finished. That while said Most was on the scaffold engaged in finishing or smoothing the cement and while Clark, Menschensky and Propoulenis were working on the scaffold beside him, the scaffold fell, precipitating the men at work thereon to the basement resulting in injuries to the said Most from which he died.

One Krause, a witness for plaintiff, testified that he was the superintendent in charge of the construction of the St. Louis Independent Packing Company, on whose building the work was being done when the so-called scaffold fell; that he had examined the so-called scaffold shortly after the accident and found the west swinging support of the center had become unfastened somehow and dropped down and precipitated the men on the scaffold into the cellar; that the lower end of the scaffold still had hanging to it the eyebeam, block, pulley and chain which had formerly passed through the concrete roof; that the chain was hanging to the end of the block. He further testified that he went to the roof of the building about an hour after the accident; that he did not find any piece of chain on the roof but he saw where the chain had been fastened; that on either side of the hole in the roof through which the chain had passed lay two pieces of 4 x 4 and across them and on top of them and immediately over the center of the hole lay another piece of 4 x 4; that he examined the chain which was hanging down and found that it had not been broken, "there wasn't even a scratch on the chain for I examined it." He further stated that he had looked about to find any broken pieces of chain but had found none; that the other two chains which were used for supporting the so-called scaffold were still intact when he was on the roof an hour after the accident and that each of them was fastened to a piece of timber 4 x 4 with a half hitch in the end of the chain and then the ends of the chain were wired together; that these said two chains were immediately down on top of the roof, whereas the

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blocks which he found over the hole through which the chain which had become unfastened or broken had the 4 x 4 lying across two 4 x 4s which lay next to the hole, so that this particular block to which the chain had been fastened was raised 4 inches above the roof; that he saw no wire on the roof and that the chain that had given way and was hanging to the scaffold had no hook in that end of it which had gone through the roof.

One Flaherty, a witness for plaintiff, testified that he was a police officer and went on the roof shortly after the accident and his testimony corroborated that of witness Krause with reference to the condition as testified to by him, and in addition he testified that the 4 x 4 immediately over the hole in the roof showed marks upon it that "I would judge looked like a chain had been on it; I couldn't swear that a chain had been on it but it looked that way to me, but I couldn't swear to it." This quoted statement of the witness was admitted without any objection on the part of defendant.

After a careful examination of the testimony adduced by plaintiff we are constrained to hold that sufficient facts and circumstances appear to afford reasonable inferences of negligence in the manner of the fastening of one of the chains which supported the contrivance referred to by counsel for both plaintiff and appellant as well as the trial judge throughout the trial below, as a scaffold, and that said chain became loose and thereby caused the contrivance to give way. It therefore results that we hold the case was one for the jury and the court properly overruled defendant's demurrer offered at the close of plaintiff's case.

The point is made by appellant that a contrivance constructed and used in the manner disclosed by the record in this case does not fall within the inhibition of the language of section 7843, Revised Statutes of Missouri, 1909, which requires "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building, shall be well and safely supported, and so secured as to insure the safety of

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persons working thereon or passing under or about the same, against the falling thereof . . . " The point is without merit. "It is apparent that our Legislature had in mind such structures as those upon which men stood and worked—the context, we think shows this . . . . It is clear that it does include by the use of the words 'scaffolds or structures' all stationary platforms, staging, threstles, and *other similar* false work used in erecting or in tearing down buildings of any kind, *in addition* to the contrivances connoted by the use of the general words *scaffold* . . . . Moreover as stated above, we think it is obvious from the very context of said section 7843 that in the clause 'scaffold and structures' the last word is *ejusdem generis*, and said clause is to be construed as meaning scaffolds, or contrivances and appliances of similar use and nature to scaffolds, viz: platforms, staging, trestles of whatever kind, and ladders supporting planks." [Deiner v. Sutermeister, 266 Mo. 505, l. c. 518, 178 S. W. 757, and cases there cited.] We hold the contrivance provided by defendant for use of the deceased to be within the purview of the said statute.

Appellant further argues that the character of work for which the contrivance was used and the labor the deceased was engaged in at the time he met with the injuries which caused his death were not of the character as would fall within the terms of the statute which applies to "all scaffolds or structures used in or for the erection, repairing or taking down of any kind of building."

It is argued that "the deceased, according to the evidence was engaged in smoothing the cement. He was certainly not erecting anything, unless it could be said that a painter, in applying paint on the wall, is erecting a structure. It was equally certain that he was not repairing anything, and there was neither allegation nor proof that he was taking down any kind of building. His fellow servants were removing the false-wood forms under the poured concrete roof. It is, therefore, clear that as to him, the statute does not

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apply, and he could base no right of recovery thereon." Clearly appellant attempts to put too narrow a construction upon the statute. The testimony is sufficient to submit to the jury the question as to whether the building on which the deceased was employed as a cement finisher was being erected or repaired. It must be remembered that defendant offered a demurrer at the close of plaintiff's case and upon its demurrer being overruled stood thereon and declined to adduce any evidence; in such instances the evidence offered by plaintiff to sustain his case must be accepted as true, together with all reasonable inferences and deductions that may be drawn therefrom. We rule this point against appellant.

We come next to the assignment of error that Most, the deceased, and Clark, and his helper Cordes, who erected the contrivance and who moved it from time to time, were fellow servants and that therefore the negligence of Clark and Cordes, if admitted, would bar a right of recovery on the part of plaintiff.

The testimony is uncontradicted that Most was a cement finisher and was employed in that capacity and that he had nothing whatsoever to do with the building of the contrivance nor with hanging or fastening same to the supports on the roof, nor with the moving thereof from time to time as the progress of the work necessitated. In fact it is uncontroverted that Clark who was a carpenter, together with his helper Cordes, did this work. By no stretch of the rule of the fellow servant law can it be applied to the facts here before us and we therefore hold that the deceased was not a fellow servant of Clark or his helper Cordes in the building, fastening or moving of the said contrivance. And this is true though the deceased and Clark and Cordes all worked together upon the contrivance after it was built and at various times after it was moved from place to place in the progress of the work; for men are frequently fellow servants when working in one capacity, and yet not fellow servants with reference to their work in another capacity. [White v.

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Montgomery, Ward & Co., 191 Mo. App. 268, l. c. 277, 177 S. W. 1089; McGrath v. Fogel (Mo. App.), 182 S. W. 813.]

Complaint is made of an instruction given for plaintiff in that it proceeded upon the theory that the chain in question was "fastened to the roof" when the averment in the petition was that the chain was negligently attached to a timber on the top of the roof of the building. One cannot read the record but be convinced that the matter complained of as error is more apparent than real. We view this assignment of error as purely technical and without real merit.

Complaint is made that the verdict, namely, $7500, is excessive when viewed in light of the testimony in the case. Deceased was a cement finisher at the time of his decease and left surviving him his widow (plaintiff herein) and four minor children. This being a death case we cannot agree that the verdict should be limited to nominal damages because the evidence failed to show what the earnings of the deceased were at the time of his death. [See Gentry v. Railroad Co., 172 Mo. App. 638, 156 S. W. 27, and cases there cited.]

Finding no prejudicial error in the record and the judgment being for the right party it is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

WILLIAM A. WOODIS, Appellant, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Respondent.

St. Louis Court of Appeals. Opinion Filed May 7, 1918.

1. **STREET RAILROADS: Negligence: Contributory Negligence: Operation of Cars: Duty to Warn: Question for Jury.** Evidence *held* to present a question for the jury to say whether or not the failure of a street car motorman to ring the gong and give warning to plaintiff, who started across the track thinking he had time to clear the car, was negligence.

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2. ———: ———: ———: **Last Chance Doctrine.** Where plaintiff's testimony shows that when he saw the car some 170 feet away he did not realize its speed, and supposed he could cross the street before it would reach him; and added to that the testimony that the car could have been stopped within forty feet, and that there was sufficient light at that place for plaintiff to be seen by the motorman at a much greater distance, made it a question for the jury to say whether or not the motorman saw, or by the exercise of ordinary care could have seen, plaintiff in peril, and whether liability should be cast upon defendant as for negligence on the part of the motorman in failing to exercise ordinary care in using the means at hand to stop or slacken the speed of the car to avoid injuring plaintiff, under the last chance doctrine.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. J. Hugo Grimm,* Judge.

REVERSED AND REMANDED (*with directions*).

John J. O'Connor for appellant.

(1) When those operating a street car sees or by the exercise of ordinary care could see a person on the track in front of said car, in a position of danger, it becomes the duty of the operator to stop the car and avoid striking such person, where the same can be done by the exercise of ordinary care with safety to the car and those on it, after the operator sees the person's danger of being hit. And a failure under such circumstances, to so stop the car, renders the owner liable for any injury done to such person if he be struck by such car. Quinley v. Springfield Traction Co., 180 Mo. App. 287; Zander v. St. Louis Transit Co., 206 Mo. 445; Felver v. Cent. Elec. R. R. Co., 216 Mo. 203; Feeney v. Railroad Co., 123 Mo. App. 420; Cole v. Metropolitan St. Ry. Co., 133 Mo. App. 440; Prenderville v. St. Louis Transit Co., 128 Mo. App. 595; Taylor v. Met. Street Ry., 256 Mo. 214; McGinnis v. Railroad, 268 Mo. 669. (2) Where the cause rests on the humanitarian doctrine, as in this cause, contributory negligence is eliminated from the cause, because the negligence of the plaintiff, if any,

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is not the proximate cause of the injury, the other fellow had the last chance to avoid the injury and neglected to embrace it. Johnson v. St. Joseph Ter. R. R. Co., 203 Mo. 381; Taylor v. Met. Street Ry., 256 Mo. 214. (3) It is only when the person goes on the track so close to an approaching car that the operator cannot, with the means at hand, stop the car before striking such person, that the humanitarian rule does not apply. And this was all that was held in the case of Reeves v. Kansas City & Chicago Railway Co. 251 Mo. 169.

T. E. Francis and *S. P. McChesney* for respondent.

The trial court properly sustained the defendant's demurrer to the evidence. (1) Appellant cannot recover on a failure to warn, because having seen the car approaching, a failure to sound the gong could not have been the proximate cause of the collision. Peterson v. Railroad, 192 S. W. 938, 940. (2) Appellant cannot recover under the humanitarian rule. (a) Because he has not pleaded nor proved said rule. Knapp v. Dunham, 195 S. W. 1062. (b) Because said rule does not apply where one sees a car approaching and goes on the track and is struck. Kinlen v. Railroad, 216 Mo. 145; Pope v. Railroad, 242 Mo. 232; Reeves v. Railroad, 251 Mo. 169. (c) Because said rule does not apply, because the respondent's motorman had the right to presume that appellant would step off the track before the car got to him. Pope v. Railroad, 242 Mo. 232.

BECKER, J.,—This is an action to recover damages for personal injuries. At the close of plaintiff's case the court, at the instance of the defendant, instructed the jury that under the law and the evidence plaintiff could not recover and their verdict must be for the defendant; whereupon plaintiff took an involuntary nonsuit with leave to set same aside. Plaintiff filed his motion to set aside the judgment of nonsuit and

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grant a new trial, which was overruled by the court, and plaintiff brings this appeal.

In the city of St. Louis, Missouri, Mississippi avenue runs north and south, and Hickory street runs east and west. On Mississippi avenue where it intersects Hickory street there are double lines of track belonging to the defendant company which operates its electric street cars thereon. There is quite a steep grade on Mississippi avenue from Park avenue, which is two blocks west of Hickory street, to Chouteau avenue which is two blocks south of Hickory street. The plaintiff had formerly been employed by the defendant as a conductor of a street car which passed over these streets.

The record discloses that on the 6th day of February, 1914, at about six o'clock in the evening, when by reason of the darkness the street lamps had been lighted, the plaintiff stood on the curb on the southeast corner of Hickory street and Mississippi avenue intending to cross over to the northwest corner of said streets at which corner he intended to board a southbound car. Plaintiff while so standing on the curb looked south up Mississippi avenue and saw a car of the defendant company approaching some distance away, and, in the belief that he had plenty of time to get across the tracks to the opposite corner started from the curb and walked rapidly in "a jog" or "dog-trot" west to the east rail of the northbound track on the Mississippi avenue and proceeded along said rail. In view of the testimony most favorable to plaintiff the car was about 170 feet away from him when he went upon the track; and Hickory street is said to be sixty feet in width. When plaintiff was within three to five feet of the north line of Hickory street he was struck by the front end of the car and sustained injuries.

Plaintiff did not turn to look at the car after he left the curb. The testimony adduced is to the effect that the motorman did not ring the bell or give any warning prior to the time the car struck the plaintiff

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and that the car traveled 100 feet from the point where plaintiff was struck before stopping. The car was running ten to twelve miles per hour and according to a witness for plaintiff could have been stopped within 40 feet under the conditions as detailed in the case.

The learned trial judge at the close of plaintiff's case when defendant offered its demurrer to the evidence, overruled same; but while the first witness adduced by defendant was upon the stand the court became convinced that it had erred in so overruling defendant's demurrer and thereupon reversed its said ruling and sustained the demurrer. The plaintiff then took a nonsuit with leave to set same aside.

Defendant asserts that the action of the learned trial judge was correct in that plaintiff's case falls within the rule as laid down in Peterson v. United Rys. Co. (Mo.), 193 S. W. 938; in which our supreme court, speaking through GRAVES, J., says: "The purpose of sounding a gong or ringing a bell is to give notice of the approaching car. If the party has this notice, without the sounding of the gong or ringing of a bell, we have universally declared that the failure to sound gong or ring bell is not the proximate cause of that injury, and should not be made the predicate for recovery. Under such circumstances the sounding of a gong or the ringing of a bell could not impart more notice than the party already had. If one, at a crossing, sees a rapidly approaching train no amount of whistling or bell ringing will give him more notice than that which his eyes have brought home to him. Indeed it would tend to confuse rather than help such a person. But be this as it may, it is clear that the submission of this ground of negligence to the jury in this case was error, for which the judgment must be reversed and the cause remanded." In the Peterson case, however, the plaintiff was sitting in an automobile, the engine of which had ceased to work and the automobile came to a stop on the tracks of the street car company. The plaintiff saw the car approaching at the moment

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the automobile stopped upon the track, the car being then distant about 600 feet running down grade at a speed of twenty to twenty-five miles per hour, and plaintiff, in the Peterson case, saw the car and its movements up until about the time it struck the automobile, and, according to plaintiff's own testimony, the car was coming so fast he did not know what to do, with the result that he remained in the automobile and suffered injuries when the car ran into it. It is therefore obvious that in the Peterson case nothing could have been accomplished by the ringing of the bell or giving warning of the approach of the car because the plaintiff saw the car at all times in its rapid approach to the spot where the automobile was stalled and was therefore fully aware of the immediate and impending danger. But in the case at bar the plaintiff left the curb, and if plaintiff's testimony is true, proceeded to the track and along it in the full belief that he would have ample time to cross the street and over the tracks before the approaching car would reach him, and consequently plaintiff did not at any time look back to see how near the approaching car had come to him, relying upon his judgment that he could cross over in safety. Can it be said in such a case that the ringing of the bell or the giving of some warning of the near approach of the car would not have served some purpose? We think not, but rather that under the facts in this case, having before us solely the testimony for plaintiff, and viewing it as we must on a demurrer, as true, and in the light most favorable to him, we must assume that the plaintiff though he had seen the approaching car, was not aware of any immediate danger to himself, and that he therefore proceeded along plaintiff's track oblivious to the close proximity of the car. Undoubtedly then the very fact that no bell or gong was sounded kept him from becoming aware of his immediate danger. We believe that under a state of facts such as is presented by plaintiff's case, if true, had the gong in point of

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fact been sounded, it is but fair to infer that the plaintiff would have been awakened thereby to a realization of his immediate peril and would have stepped off the track to safety. We are constrained to hold that this question of negligence should have been submitted to the jury.

It is argued with great earnestness that the humanitarian rule is not applicable to plaintiff's case and in support thereof we are cited the following: "The humanitarian doctrine only applies and authorizes a recovery where the injured person is ignorant or oblivious to the impending danger; but if he knew of the approaching danger, then clearly he would be guilty of such contributory negligence as would prevent a recovery, whatever the conduct of the agents in charge of the train might be." [Kinlen v. St. Ry. Co., 216 Mo. 145, l. c. 164, 115 S. W. 523, and cases there cited.] Of such rule it has been held in Pope v. Ry. Co., 242 Mo. 232, 146 S. W. 790, that: "'The foregoing language must be understood as applying to a case in which a person is upon the track at a place where he could safely have gotten off and out of danger when conscious of the train's approach."

As is so often the case the quoting of a single sentence or paragraph from an opinion does not, when taken by itself and out of the opinion, express either correctly or fully the principal of law which has been enunciated therein. And so in this case the quotation, though on the surface and when read by itself would seem to be authority supporting the action of the learned trial judge in sustaining the defendant's demurrer at the close of the plaintiff's case, yet when one reads the entire case it is obvious that such was not the holding in the said Kinlen case. In the same paragraph and preceding the sentence quoted from the Kinlen case, supra, we find the following: "The humanitarian doctrine does not go so far as to authorize a recovery where the injured party knowingly drives in front of an approaching car, *and when he knows he will not have time to cross in safety.* (Italics

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ours). To so hold would be equivalent to abolishing the law of contributory negligence. Yes, it would do more than that, for such ruling would make the company absolutely liable when a party is injured in his attempt to cross in front of the approaching car when he knows he has not the time in which to do so; and that, too, when the company is guilty of no negligence whatever, for the obvious reason that if he has not sufficient time in which to cross in front of the car in safety, then as a necessary corollary thereto the motorman would not have the time in which to stop or slaken the speed of the car and thereby avoid the injury. The law is well settled that where one *even negligently* places himself in front of a rapidly approaching train and is injured thereby, he cannot recover if the employees in charge of the train used reasonable care to avoid the injury, after they discovered his perilous position, or by the exercise of ordinary care might have discovered it. [Harlan v. Ry. Co., 64 Mo. l. c. 483.] That being unquestionably the law, then how much stronger should the reason be for holding he cannot recover when he knowingly and wilfully steps or drives in front of a rapidly approaching car? [Prewitt v. Eddy, 115 Mo. 283, 21 S. W. 742.] Nor will the law permit a recovery where the injured party knowingly places himself in a place of danger and knowingly and wilfully permits the train to strike him, even though the employes in charge thereof could have prevented it by the exercise of ordinary care."

Even under the construction of the Kinlen case as is contended for by the learned counsel for defendant, we hold that it is not authority for the action of the court in sustaining defendant's demurrer at the close of plaintiff's case. It is perfectly clear that there is no evidence upon which to predicate a finding that plaintiff knew he did not have time to cross Hickory street in safety. And his evidence makes it appear that he was oblivious to the *impending danger*, though he knew that the car was somewhere behind him.

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Plaintiff's testimony, which for the purposes of this case we are bound to consider as true, shows that when he saw the car some 170 feet away he did not realize its speed and supposed he could cross the street before it would reach him, and added to that the testimony that the car could have been stopped within forty feet, and that there was sufficient light at that place for plaintiff to be seen by the motorman at a much greater distance, made it a question for the jury to say whether or not the motorman saw, or by the exercise of ordinary care could have seen, plaintiff in peril, and whether liability should be cast upon defendant as for negligence on the part of the motorman in failing to exercise ordinary care in using the means at hand to stop or slaken the speed of the car to avoid injuring plaintiff, under the last chance doctrine. [See Flynn v. Ry. Co., 166 Mo. App. 182, 148 S. W. 122; Ingino v. Met. St. Ry. Co. (Mo. App.), 179 S. W. 771; Nufer v. St. Ry. Co. (Mo. App.), 182 S. W. 792; Strother v. Dunham (Mo. App.), 193 S. W. 883.]

From what we have said above the court erred in sustaining defendant's demurrer to the evidence and in overruling the plaintiff's motion to set aside the nonsuit and grant him a new trial. The said judgment is accordingly reversed and the cause remanded with directions to sustain the plaintiff's motion to set aside the nonsuit and grant a new trial. *Reynolds, P. J.*, and *Allen, J.*, concur.

WILLIAM B. THOMPSON, Respondent, v. GRANITE BITUMINOUS PAVING CO., and WEBB-KUNZE CONSTRUCTION CO., Appellants.

St. Louis Court of Appeals. Opinion Filed May 7, 1918.

1. **TRIAL PRACTICE: Appellate Practice: Demurrer to Evidence: Right to Recover.** The question as to plaintiff's right to recover at all was raised by the demurrers to the evidence interposed below, and is consequently presented in the appellate court by the record.

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2. ———: ———: ———: **New Trial: Harmless Error.** If plaintiff, under his petition and the evidence adduced, was not entitled to go to the jury, then the order of the trial court setting aside the verdict for defendants, upon the theory that error had been committed in the course of the trial, cannot be permitted to stand, since no such error, if any, can be said to have been prejudicial to the rights of plaintiff, and serve as a valid reason for setting aside the verdict, if in fact the court should have sustained a demurrer to the evidence.

3. **LANDLORD AND TENANT: Lack of Possession: Trespasser: Injury to Reversion.** Where the owner of land was out of possession, the entire premises being in the exclusive possession of a tenant, he cannot recover in trespass as for a wrong committed against the possession, though, as an owner out of possession, he may have his action against a trespasser for an injury done the reversion.

4. ———: **Injury to Reversion: Nature of Action.** At common law, a landlord's action for an injury done to the reversion was technically not an action of trespass, but of trespass on the case, a distinction without importance under the Missouri code procedure.

5. ———: **Damages: Measure of Damages: Injury to Reversion.** In an action of trespass on the case by a landlord for injury to the reversion by dumping earth on the premises, the measure of damages would be the depreciation in the market value of the land after the earth was dumped thereupon, from its value prior thereto, unless the cost of removing the soil thus placed upon the land would be less than the depreciation in the value of the freehold.

6. ———: **Use and Occupation: Relation of Landlord and Tenant.** An action for use and occupation of land cannot be maintained, unless the relation of landlord and tenant exists between the parties, founded on agreement express or implied.

7. ———: ———: ———: **Use of Land under License from Tenant.** An owner land, in possession of a tenant from month to month, can have no cause of action against defendants for their mere use of the land for dumping purposes or otherwise, without injury to the reversion, under license from the tenant; the evidence showing that the relation of landlord and tenant did not exist between plaintiff and defendants.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Kent K. Koerner,* Judge.

REVERSED AND REMANDED (*with directions*).

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Kinealy & Kinealy and *Sturdevant & Sturdevant* for appellants.

(1) The action of the court in sustaining plaintiff's motion for new trial for alleged error in instruction No. 5 was equivalent to overruling the motion as to all other grounds. Bradley v. Reppell, 133 Mo. 545; Ittner v. Hughes, 133 Mo. 679. (2) Where, as here, the plaintiff was not entitled to recover at all, the order granting a new trial should be set aside and the verdict and judgment in favor of the defendants reinstated. Grain Co. v. Railroad, 177 Mo. App. 194. (3) Plaintiff not being in possession could not sue for trespass. Lindenbower v. Bentley, 86 Mo. 515; Zeitinger v. Hackworth, 117 Mo. 505. (4) And he was not entitled to recover for injury to the inheritance because he did not show any depreciation in value due to defendants' acts, even assuming such acts to have been wrongful. Such depreciation in value is the measure of damages in such cases. St. Louis Trust Co. v. Bambrick, 149 Mo. 560; Bailey v. Siegel G. F. Co., 54 Mo. App. 50; Robinson v. Mining Co., 178 Mo. App. 531; Coffman v. Railroad, 183 Mo. App. 622. (5) Instruction No. 5 was correct because plaintiff was bound by the acts of his tenant Bailey as to all matters in which said Bailey, with the knowledge of plaintiff, purported to act with authority from plaintiff. 2 C. J. 435, tit. Agency; Somerville v. Railroad, 62 Mo. 391; Johnson v. Hurley, 115 Mo. App. 513. (6) And because plaintiff under such circumstances was estopped from denying the authority of said Bailey. 2 C. J. 461, tit. Agency.

David Goldsmith and *Ford W. Thompson* for respondent.

(1) The court erred in permitting the witness Keary to testify concerning the dumping of earth by various contractors without requiring any evidence

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that this was known to the plaintiff. (2) The court erred in permitting the witness David E. Murphy to testify concerning the dumping of earth by himself without requiring any evidence that this was known to the plaintiff. (3) The court erred in giving, at the instance of the appellants, the instruction hereinbefore set out.

ALLEN, J. —The petition herein alleges that plaintiff is, and at all times mentioned in the petition was, the owner of a certain tract of ground in the city of St. Louis, consisting of certain lots, with the exception of "that portion of said lots which is contained in a certain public street known as Northland avenue," which now extends through the original tract, and excepting two public alleys extending through the same; "that defendants, through their agents and servants, between April 25, 1914, and August 6, 1914, without the knowledge or consent of plaintiff, caused to be dumped and laid upon said land a large amount, to-wit, Sixty-three and seventy-one hundredths (63.71) cubic yards of earth, taken and removed from said Northland avenue; that the reasonable value of the use of said land for dumping of said earth is the sum of three thousand dollars ($3000); that no part of said sum has been paid by said defendants, although demanded." Judgment is prayed for $3000.

The answer admits that some earth was placed by defendants upon the land described in the petition, but avers "that the same was done with the permission and consent of plaintiff under verbal agreement between these defendants and plaintiff through F. H. Bailey, the tenant and occupant thereof at the time, who was the agent of plaintiff and duly authorized to make said agreement." The other allegations of the petition are denied.

The trial, before the court and a jury, resulted in a verdict for defendants. Thereafter the court sustained plaintiff's motion for a new trial on the ground that error had been committed at the trial in the

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giving of an instruction for defendants, defendants' instruction No. 5. From the order granting the new trial the defendants prosecute the appeal before us.

The evidence shows that in 1914, and for many years prior thereto, plaintiff owned the tract of land mentioned in the petition, lying on the north side of Spalding avenue between Kings highway and Union boulevards, in the city of St. Louis, containing about ten or twelve acres of land. In 1910 plaintiff rented the property to one Bailey, as a tenant from month to month, who remained such tenant and was in possession thereof during the year 1914. Bailey occupied an eight room house situated upon the land, and according to plaintiff's testimony, "had possession of all the land except what was taken for streets and alleys." It appears that in 1911 there was a large depression upon this land wherein water collected forming a pond; that plaintiff desired to have this depression filled, and that the Board of Health of the city of St. Louis took steps to require this to be done. In that year plaintiff gave a letter to one Holmes authorizing him to enter upon the premises and dump earth into the depression, and later made an arrangement with the Union Electric Light & Power Company to dump earth at this place. According to testimony for plaintiff this depression was entirely filled by some time in 1913. Plaintiff testified that he never at any time gave Bailey a permit to allow dumping upon the land; but it appears that Bailey did at different times allow contractors to use the land as a dumping place. And in 1914 the defendant Webb-Kunze Construction Co. being then engaged—under contract with its co-defendant—in excavation work for the construction of Northland avenue, which had been opened through plaintiff's tract of land, entered into an oral agreement with Bailey whereby, in consideration of the sum of $125 paid to him, Bailey undertook to authorize said defendant to dump upon plaintiff's land the dirt excavated in making this street. And under this agreement said defendant dumped earth

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over practically all of plaintiff's land. Plaintiff's evidence tends to show that the layer of earth placed upon the land varied from about one foot to something more that two feet in thickness. According to defendants' evidence there was then a depression upon the land, which was first filled by the dirt dumped by the defendant construction company. And it is said that the dumping was done under the supervision of Bailey, with the view of filling up the lower places; and that he required that the surface be "leveled up."

Plaintiff adduced evidence tending to show the reasonable value of the use of the land for dumping purposes. There is no evidence, however, tending to show any injury to the reversion or freehold by the placing of this earth upon plaintiff's land.

At the close of plaintiff's case and again at the close of the entire case, defendants offered a peremptory instruction in the nature of a demurrer to the evidence which was refused. In the view which we take of the case it is unnecessary to set out defendants' instruction No. 5, or any of the other instructions given.

Learned counsel for appellant, while contending that if the case was one for the jury it was not error to give defendants' instruction No. 5, argue with much force and earnestness that in no event was plaintiff entitled to recover under the petition and evidence in this case; that the demurrer to the evidence should therefore have been sustained; and that consequently, regardless of all other considerations, the court erred in disturbing the verdict obtained by defendants at the hands of the jury.

The question as to plaintiff's right to recover at all was, of course, raised by the demurrers to the evidence interposed below, and is consequently here presented by this record. And it is undeniably true that if plaintiff, under his petition and the evidence adduced, was not entitled to go to the jury, then the order of the trial court setting aside the verdict for defendants, upon the theory

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that error had been committed in the course of the trial, cannot be permitted to stand. No such error, if any, can be said to have been prejudicial to the rights of plaintiff, and serve as a valid reason for setting aside the verdict, if in fact the court should have sustained a demurrer to the evidence. [Johnson Grain Co., v. Railroad, 177 Mo. App. 194, 164 S. W. 182.]

Pursuing the argument advanced by appellant's counsel in this connection, the averments of the petition should first be noticed It is charged that the defendants dumped the earth in question upon plaintiff's land without plaintiff's knowledge or consent; and it is then averred that the reasonable value of the use of the land for such dumping purposes was $3000, for which a recovery is sought. Appellant refers to the petition as one seeking to recover in trespass, but says that since plaintiff admits that he was out of possession he can recover only for injury to the reversion. Respondent's learned counsel at the outset of their statement contained in their brief refer to the action as one in trespass; however, elsewhere throughout their brief they appear to deal with the action as one to recover for the value of a "dumping privilege"—by which must be meant a recovery as for the use and occupation of the land for such purpose.

It is quite clear that plaintiff being out of possession—the entire premises then being in exclusive possession of Bailey, the tenant—cannot recover in trespass as for a wrong committed against the possession (Lindenbower v. Bentley, 86 Mo. 515; Zeitinger v. Hackworth, 117 Mo. 505, 23 S. W. 763; Thurmond v. White Lime Ass'n., 125 Mo. App. 73, 102 S. W. 617), though, as an owner out of possession, he may have his action against a trespasser for an injury done to the reversion. [Bobb v. Syenite Grain Co., 41 Mo. App. 642; Bailey v. Siegel Gas Fixtures Co., 54 Mo. App. 50; Ridge v. Transfer Co., 56 Mo. App. 133.] At common law this action of a landlord for an injury

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done to the reversion was technically not an action of trespass, but one of trespass on the case—a distinction of no importance under our code procedure [Bobb v. Syenite Grain Co., supra; Ridge v. Transfer Co., supra.] In an action of this character the measure of plaintiff's damages would be the depreciation in the market value of the land, if any, resulting from the dumping of the earth thereupon (Bailey v. Seigel Gas Fixtures Co., supra; St. Louis Tr. Co. v. Bambrick, 149 Mo. 560, 51 S. W. 706; Robinson v. Mining Co., 178 Mo. App. 531, 163 S. W. 885; Coffman v. Railroad, 183 Mo. App. 622, 167 S. W. 1053); unless it appear that the cost of removing the soil thus placed upon the land would be less than such depreciation in the value of the freehold. [Robinson v. Mining Co., supra, and cases cited.]

But plaintiff has neither alleged any damages to the freehold nor is there any evidence whatsoever tending to show any such damage. Indeed, as said, plaintiff's case does not proceed upon this theory at all; on the contrary the recovery sought is for the reasonable value of the use of the land for the purpose mentioned, though the petition does not state a cause of action for use and occupation of the land, since it does not attempt to allege any contractual relation arising in any manner between the parties, but alleges that defendants made such use of the land "without plaintiff's knowledge or consent." An action for use and occupation cannot be maintained unless the relation of landlord and tenant exists between the parties, founded upon an agreement express or implied. [Hood v. Mathis, 21 Mo 308; Kohen v. Kyler, 27 Mo. 122; Hunton v. Powers, 38 Mo. 353; Edmonson v. Kite, 43 Mo. 176; Starbuck v. Avery, 132 Mo. App. 542, 112 S. W. 33; Keinstra v. King, 143 Mo. App. 33, l. c. 37, 122 S. W. 337; State ex rel. v. Dickmann, 146 Mo. App. 396, 124 S. W. 39; Haumueller v. Ackermann, 150 Mo. App. 141, 130 S. W. 91; Bracht v. Johnson, 187 Mo. App. 220, 173 S. W. 692;

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39 Cyc. 853; Young, et al. v. Home Telephone Co., 201 S. W. 635.]

Not only is the petition insufficient, as one at tempting to state a cause of action for use and occupation, but the evidence conclusively shows that the relation of landlord and tenant did not in any manner exist between the plaintiff and the defendants. For the mere use by defendants of the land, for dumping purposes or otherwise, without injury to the reversion, under license from Bailey who was in possession thereof as a tenant from month to month, plaintiff can have no cause of action against defendants. The fact that earth was not only dumped upon the land but was permitted to there remain may perhaps constitute an injury to the reversion for which defendants may be held answerable to plaintiff in damages, but plaintiff's right to recover damages for such injury, if any, is not here involved.

We regard it as quite clear that under the petition and the evidence in the case plaintiff was not entitled to recover in this action, and that the court should have sustained defendants' demurrer to the evidence. And it follows, from what he have said above, that the trial court was not warranted in granting the new trial and depriving defendants of the verdict in their favor.

The order granting the new trial will consequently be reversed and the cause remanded with directions to the circuit court to reinstate the verdict and enter judgment thereon accordingly. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

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AGITA NICASTRO CUCCIO, Respondent, v. TERMINAL RAILROAD ASSOCIATION, a corporation, and EDWARD B. PRIOR, Receiver of the WABASH RAILROAD COMPANY, a corporation, Appellants.

St. Louis Court of Appeals. Opinion Filed May 7, 1918.

1. **RAILROADS: Collision: Street Railroads: Push Car: Construction of Statute.** A push car without any mechanical apparatus for its propulsion, and primarily intended to convey tools and kindred paraphernalia used by the workmen, yet not intended to be used for conveying them, does not fall without the intendment of Rev. St. of Mo. 1909, section 3303, requiring each car on a street railroad track to be brought to a full stop before reaching railroad tracks, and making it the duty of some employee to go forward and ascertain whether a train was approaching.

2. ———: ———: ———: **Negligence: Contributory Negligence: Question for the Jury.** Where deceased, a street railway track repairer, who, on orders from his foreman, placed his tools on such push car and with others rode thereon down a considerable grade, at the foot of which were several railroad tracks, which were guarded by a watch tower, gong and gates and a watchman was posted at the time in the tower, whose duty it was to ring the gong and lower the gates upon the approach of a train, and the evidence shows that the gates were left open, and the gong on the tower was not rung, and that deceased, before going on to the push car, at a distance of more than a block away, looked and saw no train in sight and found the gates open, and that the gates remained open up to the time the tender of a backing locomotive struck the push car on the crossing, and that the bell on the engine was not rung and no whistle blown, nor was any man stationed on the tender, as required by the rules, etc., *held* that the deceased could not be guilty of contributory negligence as a matter of law, and that the court properly held that the plaintiff had made out a prima facie case.

3. **NEGLIGENCE: Contributory Negligence: Prima-facie Case: Question for the Jury.** In such a case the burden then shifts to the defendants, if they rely upon the plaintiff's negligence, to disprove or overcome that case to the satisfaction of the jury; such prima-facie case having been made out, the case can never be peremptorily taken from the jury; for, however strong the controverting testimony of plaintiff's contributory negligence may be, its credibility and weight are for the jury.

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4. **RAILROADS: Collision: Street Railroads: Negligence: Question for the Jury.** Where a terminal railroad locomotive was delivering cars to a through road, and, returning, backed across a grade street railroad crossing, although the watchman in the tower was not its employee, nor were the tracks upon which the collision occurred, nor the gates erected thereon, owned or operated by it, yet such defendant may be found liable if it passed over said street railway tracks and failed to give the necessary warning of its approach; and under the record in this case its liability *vel non* was properly held to be a question for the jury.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Wilson A. Taylor,* Judge.

AFFIRMED.

Wells H. Blodgett, George B. Webster, Henry W. Blodgett and *Walter N. Fisher* for appellant; *Edward B. Pryor,* Receiver.

(1) The deceased was guilty of such contributory negligence as a matter of law that the plaintiff was not entitled to recover. Wilds v. Railroad, 24 N. Y. 430; Coyle v. Railroad, 77 N. H. 604; L. S. & M. S. Ry. v. Franz, 127 Pa. St. 279; Lenix v. Railroad, 76 Mo. 86; Stepp v. C. R. I. & P. Ry., 87 Mo. 229; York v. K. C, C. & S. Ry., 117 Mo. 405; Mockowik v. Railroad, 196 Mo. 550; Miller v. Railroad, 4 Fed. 768. The rule that the negligence of the plaintiff which contributes to the cause of the injury will prevent a recovery is without exception or qualification. Hogan v. Citizens' Ry. Co., 150 Mo. 55. (2) It was error to submit the question of the deceased's contributory negligence to the jury, because there was no dispute about the facts. He either was or was not guilty of contributory negligence as a matter of law and the court should have so declared. Powell v. Railroad, 76 Mo. 80; Lenix v. Railroad, 76 Mo. 86; Davies v. Railroad, 159 Mo. 1; Mockowik v. Railroad, 196 Mo. 550; Fowler v. Randall, 99 Mo. App. 407. (3) The plaintiff's instruction on the measure of damages, No. 4, is erroneous and prejudicial, because it authorized the jury to

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take into consideration the support which she would have received from her husband during the remainder of his lifetime when there was no evidence of the probable duration of his life.

T. M. Pierce, J. L. Howell and *W. M. Hezel* for appellant, Terminal Railroad Association of St. Louis.

(1) The court erred in refusing to give the instruction in the nature of the demurrer to the evidence as requested by the defendant, Terminal Railroad Association of St. Louis, at the close of the plaintiff's case in chief and erred in refusing to give a similar instruction requested by that defendant at the close of the whole case. (a) Because plaintiff's testimony and all the testimony shows that the push car was not stopped not less than ten feet nor more than twenty feet from the crossing of the Wabash tracks and the street railway tracks as required by law. Sec. 3303, R. S. 1909; Boyd v. Railroad, 249 Mo. 111; Clark v. Railroad, 242 Mo. 570, 599; Mulderig v. Railroad, 116 Mo. App. 655. (b) Because irrespective of Sec. 3303, R. S. 1909, the decedent was guilty of contributory negligence as a matter of law. Willis v. Railway, 133 Mo. App. 625; Miller v. U. P. R. Co., 4 Fed. 768, l. c, 769; York v. K. C. C. & S. Ry. Co., 117 Mo. 405; Osborn v. Railroad, 179 Mo. App. 245; Burnett v. Railroad, 172 Mo. App. 51; Lann v. Railroad, 216 Mo. 563, 578; Newton v. Railroad, 152 Mo. App. 167, 172; Walker v. Railroad, 193 Mo. 453, 479; Stotler v. R. R., 204 Mo. 619, 638; Dey v. United Railways, 140 Mo. App. 463; Burge v. Railroad, 240 Mo. 76. (c) Because the humanitarian doctrine was not available to the plaintiff as the necessary elements were neither pleaded nor proven. Keele v. Railroad, 258 Mo. 62, 79. (2) The court erred in giving to the jury plaintiff's instruction No. 2, as follows: "The court instructs the jury that if they believe from the evidence in this case, that the said Terminal Railroad Association of St. Louis, defendant herein, operated an engine

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or had the same operated, which collided with the said flat car, as stated in other instructions herein, and that it was operated with the consent or permission of said receiver of said Wabash Railroad Company; and if the jury further believe from the evidence that the servants and agents of the said Terminal Railroad Association carelessly and negligently either failed to ring a bell or sound a whistle or give any other signal of the approach of such engine to said crossing; and if the jury further believe that the said servants or agents either saw or by the exercise of ordinary care might have seen the said flat car approaching said crossing and could by the exercise of ordinary care either have stopped or checked the said engine so as to prevent a collision with the said flat car; and if the jury further believe that the said servants or agents failed so to do and that there was a collision between the said engine and the said flat car, and that said Gaetano Cuccio was exercising ordinary care for his own safety and that the result of such collision was that the said Gaetano Cuccio was killed; and if the jury further believe that such acts, or any of them, of the said servants or agents directly caused the death of the said Gaetano Cuccio, then said plaintiff is entitled to recover from said Terminal Railroad Association and the said receiver of the said Wabash Railroad Company and your verdict must be for her and against the said defendants.'' Keele v. Railroad, 258 Mo. 62 and cases cited; Wasmer v. Railroad, 166 Mo. App. 215, 219.

Leahy, Saunders & Barth for respondent.

(1) A push car on the street railroad in not within the contemplation of section 3303, R. S. 1909, and the cases cited by appellant Terminal Railroad Association do not apply. The purpose of this statute was to protect passengers on street cars. This is a Terminal point, in which the Wabash does not participate and for which it does not seek credit. (2) The demurrers

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in this case should have been overruled. The gate doctrine at a railroad crossing is firmly settled in this state and the person approaching such crossing has a right to rely upon the invitation of the open gates. McNamara v. Railroad, 126 Mo. App. 152, 159-160; Edward v. Railway Co., 94 Mo. App. 36; Wack v. Railroad, 175 Mo. App. 111, 122, 123; Yonkers v. Railroad, 182 Mo. App. 558, 568. Palmer v. Railroad, 142 Mo. App. 633, 645, 650; Moore v. Railroad, 157 Mo. App. 53; Montgomery v. Railroad, 181 Mo. 477, 507; O'Keefe v. Railroad, 108 Mo. App. 177; St. Louis Merchants' Bridge Terminal Ry. Co. v. Munger, decided Oct. 29, 1917, by the U. S. C. C. A. 8, and not yet reported; Moyer v. C. & A. R. Co., 198 S. W. 839 (Supreme Court of Mo. *en banc*); Beard v. Mo. Pac. Ry. Co., 197 S. W. 907 (4), 911 (Supreme Court of Mo.); Webb v. Deering S. W. Ry. Co., 196 S. W. 86, (5) 88 (Springfield Court of Appeals). For an exhaustive discussion of the gate doctrine, see the recent case of Swigart v. Lusk et al., Receivers of the Frisco, 196 Mo. App. 471, 192 S. W. 138 (Springfield Court of Appeals, February 14, 1917); Troll v. Drayage Co., 254 Mo. 332, 338, reannouncing the rule that, when different conclusions may be drawn from the facts, the question of alleged negligence must be submitted to the jury. The question of open gates at a railroad crossing, constituting an invitation to persons to cross and an assurance that it is safe to do so, has been settled by innumerable cases, both English and American, from which we cite: Stapley v. London, Brighton & South Coast Railroad Company, 1 Ex. Checker 21; State v. Boston & Mass. Railroad Co., 80 Me. 430; Wilson v. N. Y., New Haven & Hartford Railroad, 29 Atl. 258, 18 R. I. 491; Kane v. N. Y., New Haven & Hartford Railroad Co., 30 N. E. 256 (Court of Apps. of New York); Baltimore & Ohio Railroad v. Stumpf, 97 Md. 78 (citing a number of English cases, and a large number of American cases); Cleveland, Columbus & Cincinnati v. Sch-

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neider, 45 Ohio State 678. All these cases declare that an open gate is an invitation to persons approaching the track to go across, and, as Lord Cairns said, in the case of Directors, Etc., of N. E. Ry. Co. v. Wanless, 7 Eng. Irs. App. 12 open gates: "Amounted to a statement of notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury." (3) (a) The instructions in this case were exceedingly full and very favorable to the defendant; much more so than the law justifies. There was no error in plaintiff's instructions, and all instructions must be read together. Instruction No. 2 for plaintiff, requiring the jury to find that "Cuccio was exercising ordinary care for his own safety," contained an absolutely necessary limitation in view of the plea of contributory negligence in the answer of the Wabash, and it will be noted that in the Wabash brief it is not even claimed that this instruction is erroneous. Hall v. Coal & Coke Co., 260 Mo. 351; Humphreys v. Railways Co., 191 Mo. App. 710, 720, 721; Pearson v. Lafferty, 193 S. W. 40, 43 (St. Louis Court of Appeals); Enloe v. Car & Foundry Co., 240 Mo. 440, 449. Under these authorities the omission of the above quoted clause would have been error. (b) The instruction as to measure of damages was proper. This is a Wabash point, not supported by the authority of the Terminal. Browning v. Railway Co. (*en banc*), 124 Mo. 55, 71-72, cited and approved in the case of Minter v. Bradstreet Co., 174 Mo. 444, 492, 493, and in the case of Smith v. Fordyce, 190 Mo. 30. Also see Boyd v. Railroad Company, 236 Mo. 54, 88-92, where the form of instruction in the instant case on the point on which it is attacked is approved, which instruction is found in Fugler v. Bothe, 117 Mo. 491. Also see the recent case of Albert v. Terminal Railway Co., 192 Mo. App. 665, 675-678. (4) There is a presumption that the deceased used due care for his own safety and acting suddenly in a position of imminent and unforeseen peril, he is held to only such care as the

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circumstances would require. Swigart v. Lusk et al., 196 Mo. App. 471, 480. It is probable that had plaintiff not changed his mind about stopping he could have done so before he reached the track, but we do not understand defendant to controvert the fact that he was then acting under excitement and peril, and that the *law does not require one under such circumstances to do, at his peril, the thing which afterwards appears to have been the safest.* Kleiber v. Railroad, 107 Mo. 240, 247, 17 S. W. 946; Wack v. Railroad, 175 Mo. App. 111, 125, 157 S. W. 1070; Weigman v. Railroad, 223 Mo. 699, 720, 123 S. W. 38; Hanna v. Railroad, 178 Mo. App. 281, 286, 165 S. W. 1148; Donohue v. Railroad, 91 Mo. 357, 364, 2 S. W. 424, 3 S. W. 848; Underwood v. Railroad, 190 Mo. App. 407, 418, 177 S. W. 724. *This principle is especially applicable where defendant has, by its neglect of duty and failure to give timely warning, lulled plaintiff into a sense of security and brought him unawares into the peril from which he seeks to extricate himself.* Edward v. Railroad, 94 Mo. App. 36, 45, 67 S. W. 950; Baker v. Railroad, 147 Mo. 140, 166, 48 S. W. 838; International & G. N. Railway v. Isaacs (Texas), 168 S. W. 872; Dickenson v. Railroad, 81 Atl. 104, 37 L. R. A. N. S. 150. (Italics ours.)

BECKER, J.—This is an action for damages for the death of plaintiff's husband alleged to have resulted from the negligence of the defendants. The case was tried before a judge and jury, a verdict in the sum of $3000 resulting in favor of plaintiff and against the defendants. From a judgment rendered thereon the defendants appeal.

The petition as filed was against the United Railways Company of St. Louis, Terminal Railroad Association, and Edward B. Pryor, as receiver for the Wabash Railroad Company. It will not be necessary to notice either the pleadings or the evidence in so far as it refers to the United Railways Company of St. Louis in that the trial court sustained its demurrer at the close of the plaintiff's case.

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The plaintiff's petition is based upon the negligence of the defendant, receiver for the Wabash Railroad Company, in the alleged failure of its watchman or trainman to sound the gong or to lower the railroad crossing gates erected and maintained by it at the intersection of Page avenue and its tracks, the point at which the plaintiff's husband met with his injuries which caused his death, and the petition sets up the negligence of the defendant, Terminal Railroad Association in backing its engine over the tracks of the United Railways Company, without having given any warning or signal of its approach and without having anyone stationed upon the advancing end of the tender of the locomotive as required by the rules of said defendant company. The defendant Terminal Railroad Association filed a general denial, as did the receiver of the Wabash Railroad Company, together with a plea of contributory negligence.

We are able to adopt practically the statement of facts as is presented by the appellant, Terminal Railroad Association, as follows:

"The facts as developed on the part of the plaintiff in her case in chief were that her husband, the decedent, was at the time of the accident that resulted in his death, a man of about thirty-five years of age, in good health and sober and industrious and had been earning about two dollars per day as a section laborer in the employ of the United Railways Company of St. Louis. On October 30, 1913, the day of the accident, he was working with other laborers on track repairs on a line of street railway in the county of St. Louis, west of the crossing of said street railway track with the tracks of the Wabash Railway, then operated by the defendant Pryor, as receiver, at Page avenue."

"The street railway track ran east and west and the railroad tracks substantially north and south. About noon, the deceased with three fellow laborers, all section hands, and the foreman of the United Railways Company, boarded a push car at a point about a city

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block west of the crossing and with their tools on the car, proceeded eastwardly toward the crossing, their intention being to go beyond the crossing to another point of work."

"The push car was a flat car, without equipment for its mechanical propulsion and without being equipped with any braking device. It could be stopped when proceeding by gravity by blocking the wheel with a shovel or piece of wood. For the distance from where the car started, a block or more from the crossing, it was down grade to beyond the crossing. Shortly after the start of the car the foreman of the United Railways Company stepped off the car to talk to another laborer."

"South of the street railway tracks near the crossing there was a bank of earth which obstructed the view of trains proceeding northwardly on the railroad tracks. On the north side of Page avenue and just west of the railroad tracks there was a building on the second floor of which there was installed the levers for operating the interlocking switching plant of the Wabash Railway and the levers for operating gates across Page avenue on the east and west sides of the crossing."

"The witnesses for the plaintiff testified that the gates were up or open from the time the push car started on its journey," and remained up until after the collision, "and that they did not hear any bell ring, either the bell signal on the side of the gate tower or the bell of the engine involved in the accident."

"Defendants' testimony was that this train was operated by the employees of the Terminal Railroad Association of St. Louis and had finished making a delivery of cars to the Wabash Railway. The tracks were the tracks of the Wabash Railway and the gates were operated by a Wabash gateman."

"In making this delivery, the Terminal crew backed the cars that the engine was shoving onto a side or passing track. When the cars that were to be delivered to the Wabash had been cut off from the rest

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of the train, a signal, by means of a dwarf or pot signal which was a low switchstand, was given by the gateman. This meant that the track was clear for the engine and attached cars to come out of the passing track and move northwardly and over the crossing."

Thereupon the engineer started to back north along the passing track onto the main track of the Wabash Railroad Company. The freight cars were attached to the front end of the locomotive and were being pulled along by the engine so that the tender or tank of the locomotive was the front end of the train and there was nobody stationed on the rear of the tender to warn persons at the crossing of the approach of the train, as was required by the rules of the Terminal Railroad Association.

"The engineer was in the cab on the right side which at that time was the west side of the engine proceeding northwardly."

"It was not contended nor does the evidence of plaintiff nor any of all the evidence show that the train was being operated at any rapid rate of speed."

"The speed was given by various witnesses as from four to six miles per hour at the time of the collision with the push car. The point from which the engine was started after the clear track signal was given, is stated in the evidence as being from one hundred and twenty to two hundred feet from the crossing. Two hundred feet is the distance given on the map of the tracks introduced in evidence and this defendant concedes was the distance."

"The testimony of the witnesses for this defendant shows that the engine was equipped with an automatic bell ringer and that the bell on the engine was started to ring when the engine was put into motion or just before that and continued to ring until after the accident."

"The defendant's testimony also showed that at the time the push car was coming down the grade toward the crossing, a bell attached to the side of the gateman's tower was rung to announce the lowering of

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the gates, and that the gates were being lowered when the push car was one hundred and fifty feet to two hundred feet from the crossing."

The testimony as to the speed attained by the push car when it reached near the point of collision is contradictory. Plaintiff's testimony varied from "slow" to "pretty fast," while defendants' testimony was that the push car was moving from ten to twelve miles per hour, to a statement by a witness that the car came down "awfully fast."

We will consider first the assignment of error set forth by the appellant, Terminal Railroad Association, namely, that the court erred in refusing to give its instruction in the nature of a demurrer to the evidence as requested by it at the close of the plaintiff's case in chief, and again offered and refused by the court at the close of the entire case, on the ground that under plaintiff's testimony it appears that the push car was not stopped not less than ten feet nor more than twenty feet from the crossing of the Wabash Railroad tracks and the street railway tracks, as required by section 3303, Revised Statutes of Missouri, 1909. This assignment of error requires that we decide as to whether a flat car, such as the deceased was riding upon at the time he met with his injuries and which has been termed throughout the record as a push car, and which is without any equipment for its mechanical propulsion and is not equipped with a braking device, is such a "car" as to fall within the intendment of said section 3303, Revised Statutes of Missouri, 1909.

It must be conceded at the outset that under the broad, generic term, "car," this push car would undoubtedly be included therein, but when we have in mind the language of the statute and the objects that it seemingly was designed to accomplish, we unhesitatingly come to the conclusion that a push car such as we are considering in the instant case does not fall within the purview of the statute. This section provides:

"It shall be the duty of every street railway company or corporation operating a street railway across

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the tracks of a railroad company to bring its cars to a full stop at least ten and not more than twenty feet before reaching the tracks of the railroad company. And it shall be the duty of the conductor or some other employee of the street railway company to go forward to the tracks of such railroad company for the purpose of ascertaining whether a train is approaching such crossing."

The record discloses that the push car was merely a flat car some six feet by nine feet, resting upon four wheels with no mechanism for mechanical propulsion, and wholly without any system of brakes, and intended solely to have placed upon it the tools and other equipment of the laborers who were engaged in making track repairs, and that the push car was, as its name implies, to be pushed by the laborers by hand along the track from place to place where they might be working, and excepting under the most unusual circumstances the car would never attain a speed greater than that of the laborers walking along pushing the car, nor was its normal use intended to be for the purpose of carrying any persons upon it. It would take a wide stretch of imagination to hold that such a push car was within the intendment of said statute. When one reads section 3303 A, Session Acts of 1913, pp. 189 and 190, which requires, among other things, that every street railway company, "for the convenience, health and comfort of the conductor and motorman and the person or persons operating, controlling and in charge of any and all its cars" furnish "one stool or seat for each and every such conductor, motorman or person so operating, controlling or in charge of each, any and all its said cars to use and occupy said stool or seat for a portion of each and every trip any such car may make for a distance or not less than twenty-five per cent of the full length of all the track or tracks traversed by said car," it makes it even clearer that sections 3303 and 3303A are not applicable to a push car. We have been cited some authorities which have held that a hand car, which is a car admitted to be equipped with mechanical

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apparatus for its propulsion and which is in general use for the purpose of conveying laborers and others (often for considerable distances along the tracks of steam railroad companies) falls within the intendment of certain statutes. Such cases are not authority in considering a push car which though a "car" in the broadest use of the word, yet has characteristics peculiarly its own, being without an mechanical apparatus for its propulsion and is primarily intended to convey tools and kindred paraphernalia used by the workmen, yet not intended to be used for the conveying of the workmen themselves. But whether or not a hand car would fall within the purview of our statute is a matter not before us and it is therefore not necessary for us to decide. We hold that a push car of the kind and description as the record in this case shows, does not fall within the requirements of section 3303, Revised Statutes of Missouri, 1909, and we rule this point against the said appellant.

It is next urged that the court erred in overruling the demurrers of each of the defendants, who are appellants here, on the ground that the plaintiff under the evidence should have been held guilty of contributory negligence as a matter of law. We do not so read the record in this case. According to the testimony adduced by plaintiff it appears that at the intersection of the Wabash Railway tracks and Page avenue, on which the said street railway tracks of the United Railways Company are laid, there is a large traffic and that some years ago the Wabash Railroad Company erected a switch tower at this point and erected gates which are operated by the employee in the tower, and that there was a watchman in the tower on the day in question, and that the gates were in working order; also that a gong had been installed on the outside of the switch tower which it is the duty of the watchman in the tower to ring immediately before lowering the gates. The record further shows that the deceased was thoroughly

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familiar with this condition of affairs and with the fact that it was the custom to lower the gates upon the approach of any train. On this particular day however, according to the testimony for plaintiff, the deceased, as well as his three companions, before going onto the push car at a distance more than a block away from the tracks, looked and saw no train in sight and found that the crossing gates were open, and the testimony of each of the three companions who were on the push car with the deceased is to the effect that the gates remained open up to the time the tender of the locomotive struck the push car. In addition to the element that the gates were thus left open we have the testimony that the gong on the tower was not rung, and that the bell on the Terminal Railroad Association's engine was not rung, nor any whistle blown, nor was a man stationed on the tender, as was required by the rules of the defendant, Terminal Railroad Association. And at the southwest corner, where the street railway tracks and the Wabash Railroad tracks intersect there is a mound or hill of sufficient heighth to shut off the view of the men riding on the push car to such an extent that they could not see an approaching train until they were within approximately twenty to forty feet of the railroad tracks.

Such being the record we hold that the deceased could not be held guilty of contributory negligence as a matter of law and that the court properly held the plaintiff had made out a prima-facie case entitling her to go to the jury. In such a case the burden then shifts to the defendants, if they rely upon plaintiff's negligence, to disprove or overcome that case to the satisfaction of the jury. And such prima-facie case having been made out, the case can never be peremptorily taken from the jury; for however strong the contraverting testimony of plaintiff's contributory negligence may be, its credibility and weight are for the jury. [See Peterson v. Chi. & Alton Ry.

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Co., 365 Mo. 462, l. c. 479, 178 S. W. 182, and cases there cited.]

In so holding we have in mind that the duty of exercising common prudence to avoid danger on the part of persons approaching a public railway crossing is not removed in cases where the railroad company fails to observe the requirements of law and proper care, yet if "he use such reasonable prudence for his own safety as the law of common prudence enjoins, he has the right, in the absence of information to the contrary, in determining whether the way is open and safe, to rely upon the presumption that the corporation will perform its duty and observe the precautions imposed upon it." [Weller v. C. M. & St. Paul Ry. Co., 120 Mo. 635, l. c. 653, 23 S. W. 1061; 25 S. W. 532, and cases there cited.] When, however, as in this case there are gates maintained at the public crossing and a gong for the purpose of warning pedestrians and others of the approach of the train, and such gong is not sounded, and the plaintiff's testimony, if true, shows that the gates were not lowered, and the approaching train does not ring its bell or blow its whistle nor give any warning of its approach, and it further appears that the locomotive is proceeding with the tender first with no one stationed at the advancing end, as required by the rules of the defendant, Terminal Railroad Association, the plaintiff cannot be held to have been guilty of contributory negligence as a matter of law. [Yonkers v. St. L. I. M. & S. Ry. Co., 182 Mo. App. 558, and cases therein cited.] [See, also, Railway Co. v. Schneider, 45 Ohio St. Rep. 678; State of Maine v. Boston & Maine Ry. Co., 80 Me. 430; Wilson v. N. Y., N. H. & H. Ry. Co., 18 R. I. 491.] It is well to note in this connection that the cases cited by the appellants on this point are not gate crossing cases, and therefore are not authority in a case of this kind where there is the added feature of railway crossing gates which plaintiff's testimony shows were relied upon by the de-

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ceased and which were not lowered upon the approach of the train which collided with the push car on which plaintiff was seated. And what we have said above is not affected by the argument of the learned counsel for the appellant, Terminal Railroad Association, that the watchman in the tower was not its employee, nor were the tracks upon which the collison occurred, nor the gates erected thereon, owned or operated by it, and therefore it could not be held for the negligence, if any, in the failure of the watchman to close the gates upon the approach of said defendant's train. The Terminal Railroad Association, defendant, may be found liable if it passed over said street railway tracks and failed to give the necessary warning of its approach; and under the record in this case its liability *vel non* was properly held to be a question for the jury. [Wills v. Atchison T. & S. F. Ry. Co., 133 Mo. App. 625, l. c. 636, 113 S. W. 713.]

We find no merit in the assignment of error directed at the instructions. The instructions given correctly, fairly and fully put the case to the jury, and the amount of the verdict is reasonable. Finding no error prejudicial to appellants the judgment is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

AUGUST BALTER and OLIVER J. MILLER, Trustee in Bankruptcy of the Estate of CYRUS N. CRUM, Respondents, v. CYRUS N. CRUM, Defendant, DECKER, ECKHARDT, KRATZ and JOS. S. CALDWELL, Appellants.

St. Louis Court of Appeals. Opinion Filed May 7, 1913.

1. **FRAUDULENT CONVEYANCES: Sales: Bulk Sales Law: Construction of Statute.** In construing the Bulk Sales Law, session acts of Missouri, 1913, p. 163, a statute penal in its nature, no sales are to be included as coming within its purview unless clearly within

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its terms, as sales in bulk laws, being in derogation of the common law, and of a person's right to alienate his property without restrictions, are to be strictly construed.

2. ———: ———: ———: **Construction as a Whole.** The Bulk Sales Law should be read as a whole for the purposes of construction.

3. ———: ———: ———: **Livery Stable Business: Stock of Merchandise: Fixtures and Equipment: Construction.** The Bulk Sales Law, session acts of Missouri, 1913, p. 163, applying to the sale, trade, or other disposition of the major part in value or the whole of a stock of merchandise, or merchandise, fixtures, and equipment, or equipment pertaining to the vendor's business, has no application to the sale of the wagons, horses, harness, etc., of one whose business is that of owning and operating a livery and boarding stable; the words "stock of merchandise" as used, means goods or chattels which a merchant has for sale, and the words "fixtures and equipment" mean fixtures and equipment, or either one, pertaining to the vendor's business of merchandising.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. George H. Shields,* Judge.

REVERSED.

Seebert G. Jones for appellants Decker, Eckhardt and Kratz.

(1) The court erred in permitting the introduction of any evidence against defendants Decker, Eckhardt, Kratz, and Caldwell, over the objection of the defendants, on the ground that the petition did not state a cause of action against them. Peoples Savings Bank v. Van Allsburg, 165 Mich. 524; Bowen v. Quigley, 130 N. W. 690, 34 L. R. A. (N. S.) 218; Peoples Savings Bank v. Allsbuy, 131 N. W. 100; Spurr v. Travis, 145 Mich. 721; Aff v. Morehead, 235 Ill. 40; Gallus v. Elmer, 193 Mass. 106; Everett Produce Co. v. Smith, 82 Pac. 995; Lee v. Gillen, 99 Neb. 730; Young v. Lemieux, 79 Conn. 420; Walp v. Movar, 76 Conn. 521. (2) The court erred in holding that the Bulk Sales Law of Missouri applied to and covered transactions as involved in this case as shown by the evidence. (Same as under Point One.) State v. Mc-

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Cance, 110 Mo. 398; State v. Schuchman, 133 Mo. 117; State v. Howard, 137 Mo. 288; State v. Geitner, 134 Mo. 527; State v. Reid, 125 Mo. 48; Bulk Sales Law, Session Acts Missouri 1913, p. 163. (3) The court erred in finding and holding that Decker, Eckhardt and Kratz paid Crum less than the reasonable market value for property purchased by them respectively. (The Evidence.) (4) The court erred in overruling defendants Decker, Eckhardt, Kratz, and Caldwell's motion for a new trial. (Same as under Point I.) (5) The court erred in overruling defendants Decker, Eckhardt, Kratz, and Caldwell's motion in arrest of judgment. (Same as under Point I.)

Albert E. Hausman for appellant Joseph S. Caldwell.

(1) As the sales made by Crum to Caldwell and the other appellants were each separate and distinct from the other, the Bulk Sales Law of 1913 does not apply. Carpenter v. Karner, 193 Federal Rep. 762; Cooney v. Sweat, 25 L. R. A. (N. S.) 758. (2) The mules sold by Crum to Caldwell were not merchandise, fixtures or equipment, as those words are used in the Bulk Sales Law. Bowen v. Quigley, 34 L. R. A. (N. S.) 218; Everett Produce Co. v. Walsh, 40 Washington 55, 2 L. R. A. (N. S.) 331; Rubey v. Mining Company, 21 Mo. App. 156; People v. Railroad Co., 176 Ill. Supr. 512. (3) As there was no evidence tending to show any fraud on the part of the appellants this suit was improperly brought under section 2 of the Bulk Sales Law. Joplin Supply Co. v. Smith, 182 Mo. App. 212; McGreenery v. Murphy, 39 L. R. A. (N. S.) 374; Worshaw v. Murchison, 66 Ga. 715; Torlina v. Traylicht, 21 Pac. 68, 5 N. M. 148; Finlay v. Byson, 84 Mo. 664.

Henry H. Oberschelp for respondents.

Point 1 and 2 are in reply to brief of appellants Decker, Eckhardt and Kratz, and points 3, 4 and 5 to

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that of appellant Caldwell. (1) The property and business in question, livery and boarding stable, came within the Missouri Bulk Sales Law. Laws of Mo., 1913, p. 163; Off v. Morehead, 235 Ill. 40. (2) (a) There was evidence that the judgment rendered against Decker and the judgment rendered against Eckhardt and Kratz were for the respective values of all they got, and they were not excessive. (b) Besides, this point appellants Decker, Eckhardt and Kratz are now attempting to raise in their point 3, was never brought to the attention of the trial court and was not preserved or contained in either their motion for new trial or in arrest. Canady v. Melette, 170 Mo. App. 451. (3) The sales to all of the appellants were so related as to bring each and all within the Bulk Sales Law. Moreover, Caldwell, who alone raises this contention, bought all that was left on the premises at the very time he saw the others taking away what they had just bought. Laws Mo., 1913, p. 163. (4) The mules were part of the business equipment, and the pleadings, Caldwell's answer as well as the separate answers of the other appellants, all framed practically alike, on which the case went to trial, by admitting the mules were part of the business equipment, preclude the question. See abstract, pp. 10, 11, 7, 8, 13, 14, 16. That question was not raised in the trial court. (5) Caldwell is the only appellant claiming judgment in this proceeding not maintainable for alleged reason set forth in his last point. (a) The sale was "fraudulent and void as against all creditors of the vendor" as defined in section 1 of the Bulk Sales Law. Accordingly the judgment in this proceeding is well authorized by section 2 thereof. Laws Mo., 1913, p. 163. (b) Moreover, this judgment is in favor of the main plaintiff, Oliver J. Miller, the vendor's trustee in bankruptcy, for the benefit of all his creditors, and as section 1 of the Bulk Sales Law made such sale a fraudulent transfer, said trustee in bankruptcy is

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also entitled to this judgment under the authority vested in him by section 70, paragraph "e," of the Bankruptcy Law, which provides that the trustee in cases of fraudulent transfer "may recover the property so transferred or its value." Bankruptcy Law, sec. 70-e. (c) Furthermore, Caldwell had such knowledge or information and so assisted Crum in the fraud on the creditors as to render him liable irrespective of the Bulk Sales Law. Carpenter v. Karney, 193 Fed. 765; Remington on Bankruptcy, sec. 1496; Woodman on Trustee in Bankruptcy, p. 567.

BECKER, J.—This is a suit predicated upon the Bulk Sales Law of Missouri, Session Acts of Missouri, 1913, page 163. The amended petition alleges that the defendant, Crum, conducted a livery and boarding stable under the name of Crum's Boarding Stable, in the city of St. Louis, and owned and used in the said business many horses, mules, buggies, wagons, carriages, harness, and hay, oats, corn, feed, vehicles, goods, merchandise, fixtures and equipment; that said Crum had been adjudged a bankrupt and one Miller duly elected and appointed trustee of said bankrupt estate, and that such trustee had been duly authorized and directed to join in this suit as party plaintiff for the benefit of all the creditors of said Crum in bankruptcy. It was further alleged that in the early part of January, 1915, said Crum was indebted to one Balter, a plaintiff in the case, and to numerous other creditors in large amounts, and that for the purpose of hindering, delaying and defrauding his, the said Crum's creditors, he, the said Crum, sold and otherwise disposed of all of his said horses, mules, buggies, wagons, carriages, harness, and hay, oats, corn, feed, vehicles, goods, merchandise, fixtures and equipment pertaining to his said business, to the several defendants at much less than their real value and otherwise than in the ordinary course of trade and otherwise than in the regular prosecution of said Crum's business, and all as substantially one transaction and proceeding, and occurring substantially at

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one time; that none of said vendees demanded or received from said vendor a written statement of the names and addresses of all the creditors of said vendor, together with the amounts of indebtedness owing by said vendor to each of such creditors; that none of said vendees notified or caused to be notified any of the creditors of said vendor of said proposed sale and trade or other disposition of said property, and that said vendor and vendees and each of them fraudently failed and refused to comply with any of the provisions of the law pertaining to such sales in bulk, approved March 25, 1913, Laws of Missouri, 1913, page 163; that none of said vendees are innocent bona-fide purchasers for value. That the defendant Crum thereafter left the city and applied all the proceeds of said sale of the property to his own use and that exclusive of the property so fraudulently transferred to the defendants there was no property of said bankrupt left for the payment of the claims of his creditors. The prayer was in conformity with the relief provided by the Bulk Sales Law.

Each of the appellants, after unavailing demurrers, filed answers in which it was admitted that each of the defendants had bought certain specific property from the defendant Crum and that no notice, as required by the Bulk Sales Law of Missouri, had been given. The reply was a general denial. A trial was had and resulted in a finding and judgment in favor of the trustee in bankruptcy, one of the plaintiffs herein, and against each of the several appellants here, defendants below, for various amounts. After unavailing motions for new trial and in arrest of judgment the said defendants bring this appeal.

It is not necessary that we go into the evidence in detail it being sufficient to state that plaintiffs' testimony makes a case providing the petition states a cause of action. In other words the sole question before us on appeal is as to whether or not the sales as alleged in the petition are within the intendment of the Bulk Sales Law of Missouri.

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If our Bulk Sales Law is broad enough to include a livery and boarding stable within its purview then this appeal must fail, otherwise the judgment must be reversed. The law in question while not a criminal statute is yet penal in its nature and it needs no citation of authorities that in construing statutes of this character no sales are to be included as coming within its purview unless such sales are clearly within its terms. Sales in bulk laws are in derogation of the common law and of a person's right to alienate his property without restrictions and are to be strictly construed.

While bulk sales statutes are now common most of them seem to apply only to sales of a "stock of merchandise" or a "stock of goods, wares, merchandise or stock of merchandise and fixtures," but the Missouri statute applies to the "sale, trade or other disposition of the major part in value, or the whole of a stock of merchandise, or merchandise, fixtures and equipment or equipment pertaining to the vendor's business." When our statute is read as a whole as in fact it should and must be, it is clear that the intent of the lawmakers was to regulate the sale, trade or disposition of stocks of merchandise and in connection with any such stock of merchandise, the fixtures or equipment or both pertaining thereto. The words "stock of merchandise" are here used in the common and ordinary acceptation of those terms and are intended to mean goods or chattels which a merchant has for sale, such as is often referred to by the phrase "stock in trade" and the words fixtures and equipment mean fixtures and equipment or either one, pertaining to the vendor's business of merchandising.

In view of the language of the statute itself we hold that this last has no application to the sale of the wagons, horses, harness, etc., of one whose business is that of owning and operating a livery and boarding stable. In fact in several of the states in which bulk sales laws somewhat similar to the one under discussion have been held unconstitutional, it has been on the ground that the law is special class legislation which

is prohibited by the constitution of such States, and in the opinions of the courts it has been pointed out that such statutes limit their operation to merchandise and do not include farmers, manufactures, hotel keepers, mine owners, etc. [See Off & Co v. Morehead, 235 Ill. 40; Block v. Schwartz, 27 Utah, 387; McKinster v. Sager, 163 Ind. 671; Miller v. Crawford, 70 Ohio, 207; Wright v. Hart, 182 N. Y. 330.] And in the case of Wilson v. Edwards, 32 Pa. Super. Ct. 295, and in Spurr v. Travis, 145 Mich. 721, in sustaining the constitutionality of a bulk sales law it was *assumed* that it applied only to merchandise and did not include farmers, manufacturers and others.

The supreme court of the State of Washington in construing a bulk sales law which had been enacted in that State held that the horses, wagons and harness of a livery stable keeper are not within the provisions of such statute requiring every person who shall purchase "any stock of goods, wares or merchandise" in bulk to take a statement under oath of the creditors of the seller. [See Everett Produce Co. v. Smith, et al., 82 Pac. 905.]

We are of the opinion that our Bulk Sales Law was enacted for the protection of persons who extend credit to merchants relying upon their right to credit as ascertained from a financial report of such merchant's assets and liabilities and his past record with reference to prompt payment or settlement for goods purchased, together with a reliance upon the fact that such merchant is a *vendor of merchandise* which of necessity presumes that such merchant keeps on hand a stock of merchandise for sale, and which stock is not sold in bulk but to be kept up and replenished from time to time as the sales made therefrom may require. Credit extended in this manner presupposes a continuance in the business of merchandising on the part of him to whom the credit is extended; but it often happened that merchants who had become involved financially would dispose of their entire stock of goods to one or more persons without notice of any kind to their

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creditors and perpetrate a fraud upon them, and our Legislature undoubtedly enacted the statute under discussion to prescribe a practical method for sales in bulk which would give due notice and protection to all parties interested and at the same time provide a remedy to defrauded creditors in cases where sales in bulk were made without complying with the requirements of such statute.

We hold that plaintiff's petition fails to set up allegations sufficient to state a cause of action under the Bulk Sales Law act. The judgment is reversed. *Reynolds, P. J.*, and *Allen, J.*, concur.

FRANK SEITZ, Respondent, v. PELLIGREEN CONSTRUCTION & INVESTMENT COMPANY, a corporation, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 4, 1918. Opinion Filed May 7, 1918.

1. **PLEADING: Aider by Judgment: Statute.** In an action for personal injuries to an employee struck by an object falling from a building in the course of construction, the petition averring common-law negligence in failing to provide a safe place to work, in the absence of a motion to make more specific, was sufficient after judgment, although it did not aver violation of a building ordinance requiring temporary floors, in view of Rev. St. of Mo. 1909, section 7843, providing that all persons engaged in the erection, repairing, or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or nearby, since the ordinance requiring temporary floors is but a particularization of the statute.

2. **———: Negligence: Evidence: Admission of Ordinance.** Even though in such case there is no common-law rule providing for the putting in of floors as the work progresses, nevertheless, where an injury results from the failure to put in floors and the statute or ordinance requires them, the omission goes to the establishment of negligence and the ordinance, doing no more than making special, specific provisions, was not improperly admitted, although not pleaded, as tending to show negligence, and while it is true that when a party alleges specific acts of negligence, he is held to

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the proof of those acts, that is very far from holding that when a party alleges negligence, generally, he cannot prove specific acts.

3. **MASTER AND SERVANT: Injuries to Servant: Conflicting Evidence: Question for the Jury.** In such action, a peremptory instruction for defendant was properly refused, where the testimony, though conflicting, contained substantial evidence entitling plaintiff to go to the jury.

4. **TRIAL PRACTICE: Appellate Practice: Objections in Trial Court: Motion for New Trial: Sufficiency: Instructions.** Where the only attacks in the motion for a new trial, made upon the action of the court on instructions, which is to the action of the court "in giving instructions to the jury as asked by plaintiff, duly objected to by defendant," and "in refusing proper declarations of law asked by defendant," the appellate court might decline to consider these assignments of error because of the language of the motion for new trial.

5. **MASTER AND SERVANT: Injuries to Servant: Instructions.** In an employee's action for personal injuries due to being struck by an object falling from a building in the course of construction, because of the absence of temporary flooring, an instruction that if, while plaintiff was working on the third floor of the building a piece of building material or other substance fell from some floor, or location above, and struck plaintiff, by reason whereof plaintiff was knocked, or fell, from the third floor of said building to the first floor thereof, and was injured; and that at and immediately preceding, plaintiff's injuries, if any, the defendant failed to exercise ordinary care to have the joists or girders on each floor of said building above the second floor covered with scaffold boards or other suitable material, as the building progressed, so as to sufficiently protect workmen; that is, to make it reasonably safe for workmen and for the plaintiff from falling through such joists or girders of said building and to protect workmen, or make it reasonably safe for workmen, or plaintiff, who might be under or below the floors of said building from falling bricks, or other substances; and that such failure on defendant's part to have the joists or girders of each floor above the second floor of said building, covered with scaffold boards or other suitable material to make it reasonably safe for workmen, or plaintiff, as the building progresses, was negligence, etc., was correct.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. George H. Shields,* Judge.

AFFIRMED.

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R. J. Balch and *Jno. P. McCammon* for appellant.

(1) The allegations of the petition were insufficient to admit evidence of statutory or ordinance violation. There is no act of the defendant pleaded, only (Abs., pp. 1, 2 and 3) that the defendant was in charge of the erection of a building and in exclusive control of all parts of it, and on which plaintiff was employed. All the circumstances essential to support the action must be alleged, or in substance appear on the face of the declaration (citing authorities). Kennayde v. Railroad, 45 Mo. 255; Reynolds v. Railway Co., 85 Mo. 90. There is no rule of the common law requiring dangerous machinery to be fenced or guarded, and the master is not answerable if a servant of full capacity is injured in consequence of working about unguarded machines. Bair v. Hebel, 103 Mo. App. 632, and cases cited. Neither is there a rule of the common law requiring any floor of a building to be covered over as the building progresses. The petition in the last case was held good only because one specification of negligence "sufficiently states a cause of action based on appellant's failure to comply with its (the act's) requirements," either expressly or by implication. Hogan v. Railway Co., 150 Mo. 48, 49; Lore v. Mfg. Co., 160 Mo. 608; Lohmeyer v. Cordage Co., 214 Mo. 685, 113 S. W. 1108. So strict is the law in the admission of evidence in such cases that where one breach of a statute is pleaded as the negligence relied on for recovery, the plaintiff cannot prove nor recover upon another and different breach of the same section. Huss v. Heydt Bakery Co., 108 S. W. 63, 210 Mo. 44; McClure v. Feldman, 184 Mo. 710, 84 S. W. 16; Chitty v. Railway Co., 148 Mo. 64, 74; Bromley v. Lumber Co., 127 Mo. App. 151, 104 S. W. 1134; Casey v. Transit Co., 103 S. W. 1146, 205 Mo. 721; King v. Ry. Co., 109 S. W. 859, 130 Mo. App. 368. The same ruling, for the same reason, on similar pleading of the ordinance, was made in Gratiot v. Railway Co., 116 Mo. 450.

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(2) The court erred in admitting in evidence the ordinance. The case referred to by the trial court in the 116 Appeals, as authority for the admission of the ordinance, evidently is that of Mulderig v. Railroad Co. et al., 116 Mo. App. 655. But the law had not, before the passage of the ordinance here, made it negligence to fail to "lay scaffold boards over the joists and girders of a building as it progressed." It therefore required an ordinance before such failure could become negligence, and such negligence would not be common-law negligence, but statutory or ordinance negligence. If authority be needed to support this seemingly self-evident proposition, we have it in the opinion of the Supreme Court, speaking through Judge LAMM in Lohmeyer v. Cordage Co., 113 S. W. 1108, 214 Mo. 685. That action was grounded on a violation of a section of the Factory Act, requiring cogwheels and gearing to be uncovered and unguarded. The facts showing a violation of the act were pleaded. The court said: "Her (plaintiff's) case is confessedly based on that statute, for at common law an employer owed no duty to his employee to fence his machinery." This court also has so held in case of Bair v. Heibel, 103 Mo. App. 621, saying: "It seems there is no rule of the common law requiring dangerous machinery to be fenced or guarded and that the master is not answerable if a servant of full capacity is injured in consequence of working about unguarded machines," citing numerous authorities and including therein Lore v. Mfg. Co., 160 Mo. 608. "As between master and servant the master is not required to furnish the best and safest known appliances. . . . So with respect to its common-law duty to the public, it is not whether there are known appliances which the defendant did not use, but whether the appliances it does use are such as a person of ordinary prudence would have used which determines its negligence. There was therefore no error in the ruling of the court sustaining the motion to strike out

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this allegation in the petition." Hogan v. Railway Co., 150 Mo. 48 and 49: "It is not the duty of the master to furnish any particular kind of tools, implements or appliances. His duty in this respect is to use ordinary care and deligence in selecting and furnishing safe and suitable tools ad implements." Bohm v. Railway Co., 106 Mo. 433; Sutherland v. Lbr. Co., 130 S. W., 41, 149 Mo. App. 338; Shimers v. Mullins, 117 S. W. 91, 136 Mo. App. 298; Wilkinson v. Bottling Co., 136 S. W. 720, 154 Mo. App. 563. In Danker v. Mfg. Co., 102 Mo. App. 723, the court said: "The city ordinances referred to in the statement were improperly admitted as evidence and were of prejudicial influence, as a violation of them was not counted on in the petition as a cause of action." (3) Evidence violation of the ordinance was improper. (4) Plaintiff's Instruction No. 1 did not declare the law. The negligence declared on, and the theory of plaintiff at the trial conforming thereto, was common-law negligence. (5) Defendant's Instruction "E" properly declared the law in an action for common-law negligence. Under the authorities heretofore cited herein under points 2 and 3, it is clear that there was no duty at common law on defendant to lay floors or cover with scaffold boards the joists or girders of any floor as the building progressed, its duty being simply "to exercise ordinary care to provide reasonably safe tools and appliances for, and to make reasonably safe" the place of plaintiff. (6) This case must be tried in appellate court on the same theory as that on which it was tried below. Franklin v. School Dist., 197 S. W. 345; Huss v. Bakery Co., 210 Mo. 52, 108 S. W. 63; St. Louis v. Wright Con. Co., 210 Mo. 491, 109 S. W. 6, and authorities cited.

Claud D. Hall for respondent.

(1) It was proper to show under the petition that the defendant did not cover the joists or girders of the building on which plaintiff was working. (a)

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The plaintiff could prove any facts or circumstances which fairly tended to establish the negligence of the primary fact (the falling material and plaintiff being struck and falling) complained of. Fisher v. Golladay, 38 Mo. App. 531, 537. (b) It was the defendant's duty to cover the joists and girders with scaffold boards or other suitable material to make it reasonably safe for plaintiff. LaBatt on Master and Servant, sec. 999 (p. 2675) and see cases under section 924 LaBatt pp. 24, 72-3-4; Section 7843, R. S. 1909; Pierson v. Gohr, 126 Maryland, 395; American Window Glass Co. v. Noe, 158 Fed. 777, 780. (c) Under a general allegation of negligence plaintiff may properly offer evidence tending to show specific acts of negligence. Wolven v. Springfield Traction Company, 143 Mo. App. 643; Hall v. Wabash, 165 Mo. App. 115; Hales v. Raines, 162 Mo. App. 46; Fields v. Levier, 184 Mo. App. 685. (d) Defendant did not raise the question of variance, by filing an affidavit as required by section 1846, R. S. 1909. See also; Holland v. Metropolitan St. Ry. Co., 157 Mo. App. 476; Waldhier v. Railway Co., 71 Mo. 514-516; Fisher v. Realty Co., 159 Mo. 562; Harrison v. Lakeman, 189 Mo. 589; Scalpino v. Smith, 154 Mo. App. 524. (2) The court did not err in admitting the ordinance in evidence. (Mulderig v. Railroad, 116 Mo. App. 655, 665; Bailey v. Kansas City, 189 Mo. 503, 514; Bragg v. Met. St. Ry., 192 Mo. 331, 350; Robertson v. Railroad, 84 Mo. 119, 121; McKee v. Peters, 142 Mo. App. 286, 288; Shell v. Railroad, 132 Mo. App. 528, 535; Welsch v. Railroad, 26 Mo. App. 358, 365; Becker v. Schutte, 85 Mo. App. 57; Marshall v. United Railways Co., 184 S. W. 159; Brannock v. Elmore, 114 Mo. 55, 59; Fergus Lane v. Atlantic Works, 111 Mass. 136; Briggs v. Railroad, 72 N. Y. 26; Meek v. Railroad, 38 Ohio 632; Devlin v. Gallagher, 6 Daly's Reports 494; Bain v. Light and T. Co., 116 Ark. 125; McGrath v. Railroad, 63 N. Y. 522; Knupple v. Knickerbocker Ice Co., 84 N. Y. Sup. 488; Oddie v. Mendenhall, 84 Minn. 58; Jones v. Co-opera-

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tive Association, 109 Me. 448; Scott v. Dow, 162 Mich 637; Lichtman v. Rose, 110 N. Y. Supp. 935; Henderson v. Durham Traction Co., 132 N. C. 779; Connor v. Electric Traction Co., 173 Pa. 602; Harrison v. Sutter St. Ry. Co., 116 Cal. 165; Stevens v. Boston Elevated Ry. Co., 184 Mass. 476; Orr. v. Baltimore & Ohio R. Co., 153 N. Y. 920, 168, App. Div. 548. (3) Evidence of a violation of the ordinance was proper. Same authorities as under point 2. Gordon v. Roberts, 30 California App. 76; Orr v. Railroad, 153 N. Y. 920, 168 App. Dw. 548; Fane v. Phila. Rapid Transit Co., 228 Pa. 471, and cases cited, l. c. 474; Grand Trunk Company v. Ives, 144 U. S. 408. (4) Plaintiff's Instruction No. 1 which submitted question of whether defendant was negligent in failing to have the joists and girders covered was proper because it submitted the negligence shown at the trial. (a) The defendant's motion for a new trial does not contain a sufficient ground upon which an assignment or error as to this instruction can be based. The fifth ground of the motion for a new trial (Abs., p. 82) is too general and it does not state the instruction is erroneous. Revised Statutes of Missouri, sec. 1841-1909; State v. Norman and David, 159 Mo. 531; Cook v. Clary, 48 Mo. App. 166. (b) But the instruction was proper under the specific negligence proven. See all authorities under Part 1, a and b. Yoder v. Wolff, 190 Mo. App. 48; Hales v. Raines, 162 Mo. App. 46, 58; Mulderig v. Railway, 116 Mo. App. 655; Fields v. Siever, 184 Mo. App. 685; Nagel v. Railroad, 169 Mo. 289; Beave v. Transit Co., 211 Mo. 331; Hall v. Wabash, 165 Mo. App. 115. (5) Defendant's Instruction E was properly refused. (a) It erroneously told the jury that it was not the duty of the defendant to lay floors over part of building designed for use as elevator shaft, although the failure to do so, rendered plaintiff's place of work unsafe. (b) It was erroneous because it assumed plaintiff was working in a space designed for the elevator shaft, while plaintiff testified there was no shaft there—only the place where the shaft

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would be later constructed, and plaintiff testified he was not in said shaft hole. (6) Defendant's Instruction F. was properly refused. (a) Because it told the jury that the ordinance introduced in evidence did not require any floors where elevators were designed to be placed or operated, although the ordinance itself makes no exceptions as to openings left for the elevator shaft. (b) Because the instructaions assumed that plaintiff was working in the elevator shaft opening when injured, although plaintiff testified he was outside of the opening that would later be the elevator shaft.

REYNOLDS, P. J.—Action for damages alleged to have been sustained by plaintiff while in the employ of the defendant.

The petition alleges that defendant was in charge, and in the exclusive control of the erection of a building on Fourth near Vine street, in the city of St. Louis, and that on or about November 30, 1917, while plaintiff was in the employ of defendant, and doing carpenter work on the third floor of the building, plaintiff was "by reason of the negligence of the defendant, struck by a piece of building, or other, material, with great force and violence, which fell from a floor above the third floor on which plaintiff was working, by reason whereof, and by reason of the negligence of the defendant, the plaintiff fell with great force and violence a distance of about forty feet, from the third floor of said building and to the first floor of said building, and that by reason of being struck as aforesaid, and by reason of falling said distance as aforesaid, which was due to the negligence of the defendant, as aforesaid, plaintiff received the following injuries" (describing them), and alleging that he was permanently injured.

The answer was a general denial.

The trial was before the court and a jury, followed by a verdict and judgment for plaintiff in the sum of $5000. Filing a motion for new trial as also in arrest,

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and excepting to the overruling of each of these, defendant has duly appealed.

The plaintiff in this case was instructed by his foreman to go on the third floor of the building and take some measurements, and while standing on a girder, using a plumb line to get some timbers straight, he was struck on the head by a piece of falling building material, which plaintiff thought was a board two and a half feet long. He became unconscious and fell from the third floor a distance of about thirty feet, and received the injuries complained of. The building in question was what is known as a slow combustion building, with its interior frame work made both of steel and wood, that is its joists and girders were steel and wood and with columns about fifteen feet apart. The building when completed was to be seven stories high, its exterior walls of brick but at the time of the accident the brick work had only been completed to the fourth floor and the brick masons and hod carriers were working on that floor at the time plaintiff was injured. The girders of the building were laid about sixteen feet apart and joists were laid in between the girders, about four feet apart, on the respective floors. There was an engine and hoists at the rear or east end of the building, on the first floor, used for conveying material up through the building, and on the second floor there were some boards over the engine to protect the engineer below. There was an open space along the north wall of the building, about fifty-one feet from the front, left open to be used as an elevator shaft but not inclosed or caged in, and the plaintiff was standing south of this when he was struck, this shaft, or space designed for a shaft, being in the same condition as the rest of the floors; that is, according to the testimony for plaintiff, all open and uncovered, except as to the cover for the engine on the second floor, and scaffold boards on the fourth floor, which, according to the testimony on behalf of plaintiff, covered only about one-fourth of the space of the fourth floor, or so much only as was needed for the brick layers to put their

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scaffolds and materials on in the prosecution of the brick work. There also appears to have been runways to run a wheelbarrow over, from one part of these floors to the other when the brick layers were at work. According to the testimony for plaintiff, there had been no permanent floors and no temporary floors laid on either of the floors above, and that evidence tended to show that it was customary in buildings of this kind to either lay a thick permanent floor on each floor as the building progressed, and then lay a thin finished floor over it when the building was nearing completion, or to lay a temporary floor on the respective floors as the building progressed, for the protection of workmen. Neither of these plans, however, according to the testimony for plaintiff, were here pursued. That evidence tended to show that in a building of this kind—a slow combustion building—as it is called, it is not practical to lay the permanent, heavy floor as the building goes up from floor to floor, as often times it would get wet and expand. There was also evidence that there was some temporary flooring laid on the joists and girders outside of the covering over the engine on the second floor, and also the scaffold boards on the fourth floor used by brick layers, which, when they were used by the brick layers on a floor, were removed from that floor and taken to the next floor above, on which they would place their trestles and materials.

Plaintiff testified postively that on the third, fourth, or fifth floors there was no temporary flooring between the girders, except a plank run, over which to run wheelbarrows, usually three of such runs, one through the center, the others on the sides; nothing else in the rest of the space between the girders, except joists about sixteen feet apart, and eight by fourteen inches, the girders about fourteen inches square, the space between the joists about four feet, two joists between each girder. Plaintiff testified that under the direction of his immediate foreman, he was on the third floor using a plumb line, hanging down over the floor above to get measurements for timbers on which he was working;

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that he was in a stooping position, measuring, when something came down from above and hit him on the back of the head. It was a piece of wood, he thought, about two feet long. It knocked him unconscious and off of the girder. Plaintiff was sure that the object which struck him came from the fourth or fifth floor.

On cross-examination plaintiff repeated that he was positive that when he was hurt the brick layers were at work on the west and north walls of the floor above; that there was no covering over the whole of this floor; that he was not sure what hit him; would not say that that made him unconscious at once but was unconscious when he fell, and did not know whether he became so when he was hit or when he hit the first floor; knew he had become so when he hit the first floor, or between, and was so when he struck the first floor; was sure that the thing that hit him came from above; saw it before he became unconscious; thinks it was a plank a couple of feet long; had had on a heavy woolen cap and the thing which struck him left no scar, just a sore spot.

There was some corroborative evidence of plaintiff's testimony, and from even his own witnesses, and from all of defendant's witnesses, contradictory testimony as to the fact of the floors being covered.

All this testimony as to the covering of the upper floors was objected to by the defendant throughout the whole trial as a matter not covered by the petition, and objection was specifically made on that ground when plaintiff offered and introduced the city ordinance, section 406, Rombauer's Revised Ordinances of the City of St. Louis 1912, p. 608. That section reads as follows:

"It shall be the duty of the person or persons having charge of the construction of any building hereafter erected, to have joists or girders of each floor above the second floor covered with scaffold boards or other suitable material as the building progresses, so as to sufficiently protect the workmen, either from falling through such joists or girders, or to protect the

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workmen or others who may be under or below each floor from falling bricks, tools or other substances, whereby accidents happen, injuries occur, and life and limb are endangered."

The assignments of error made by the learned counsel for appellant are, first, in admitting testimony as to a cause of action different from that alleged in plaintiff's petition; second, that in this action, based upon common-law negligence, in permitting plaintiff to introduce testimony tending to show negligence under an ordinance not pleaded nor referred to in the petition, not in issue in the case, and which evidence tends in nowise nor manner to prove common-law negligence, and in permitting plaintiff to recover upon such cause of action without a scintilla of proof of common law negligence; third, in admitting testimony tending to show that the defendant had not covered with scaffold boards each floor above the second floor of the building under construction at the time of plaintiff's injury; and, fourth, in admitting in evidence the ordinance which was the sole basis of plaintiff's right of action.

These four assignments are practically on the same point.

When the taking of testimony was commenced, learned counsel for appellant objected to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute any cause of action and did not allege any acts which constitute negligence. This was overruled, plaintiff excepting. We think that objection was properly overruled. A motion to make the petition more specific as to the negligence relied on, might have been proper, but no such motion was made, and after judgment, as here, we think the petition is sufficient.

Section 7843, Revised Statutes 1909, provides:

"All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as prevent injury or accident to those at work or nearby."

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The city ordinance referred to, and which we have quoted, is but a particularzation of this part of the section. In point of fact, this presents a case of negligence in failing to provide a safe place to work—actionable at common law.

In Fisher v. Golladay, 38 Mo. App. 531, l. c. 537, it is said by Judge ELLISON, speaking for the Kansas City Court of Appeals:

"The wrongful act complained of—the act which led to the injury—was carelessly selling and delivering to the plaintiff a deadly poison instead of the harmless medicine he called for. The contention of counsel presupposes that no act of negligence can be proved except it be alleged in the petition. This position is untenable. The allegation in a pleading that the party, complained against, negligently committed the particular act which led to the injury, whose redress is sought, furnished the predicate for the proof of all such incidental facts and circumstances, both of omission and commission, as fairly tend to establish the negligence of the primary fact complained of. This rule of pleading is abundantly established by authority."

A number of cases are cited in its support.

In Mulderig v. St. Louis, K. C. & C. R. Co., 116 Mo. App. 655, 94 S. W. 801, Judge BLAND, speaking for our court, said (l. c. 655):

"The defendant railroad company contends that as the petition does not allege that it violated city ordinance 1753, it was error to admit it in evidence for the purpose of proving the company guilty of negligence in failing to have a man stationed on the back end of the train. The petition alleges negligence, generally. The action is not based upon any ordinance or statute but is as at common law. The authorities in this State are all one way that the ordinance of a city, which forms the basis of an action, must be specially pleaded, and if not pleaded cannot be introduced in evidence. (Citing cases.) But all of these cases hold that where the action is not based upon an ordinance, but is at common law, and where the ordinance itself does not

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give a right of action, but prescribes a duty to be performed, the ordinance is admissible for the purpose of proving negligence. The ordinance offered in evidence furnishes no cause of action; it only prescribes certain duties to be performed by railroads operating trains within the limits of the city. It would be negligence to omit the performance of these duties and we think, on the authorities, supra, the ordinance was properly admitted in evidence."

Learned counsel for appellant argues that there is no common-law rule providing for the putting in of floors as the work progresses. Nevertheless, where an injury results from the failure to put in floors, and the statute or ordinance requires them, the omission goes to the establishment of negligence and the ordinance, doing no more than making special, specific provisions, was not improperly admitted, although not pleaded, as tending to show negligence. It is true that when a party alleges specific acts of negligence, he is held to the proof of those acts, but that is very far from holding that when a party alleges negligence, generally, he cannot prove specific acts.

In Bailey v. Kansas City, 189 Mo. 503, 87 S. W. 1182, it is said (l. c. 514):

"If a cause of action is based directly on a violation of a duty imposed alone by a municipal ordinance, the pleading should set forth the specific ordinance in hand because courts will not take judicial notice of its existence. (Citing cases.) But if an ordinance of a city is used as a mere matter of evidence, no good reason is perceived why it should be pleaded; for to plead evidential facts is bad, and, on principle, the rule applies to ordinances. (Citing cases.) Now, the case under the fourth amended petition is not based on the violation of a municipal ordinance, but is based on the violation of a duty imposed by general law. Therefore, the objection, in the form made, was properly overruled."

In Bragg v. Metropolitan St. Ry. Co., 192 Mo. 331, 91 S. W. 527, practically the same rule is announced

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as in the Bailey Case, supra. We therefore hold that all of the objections made to the introduction of this testimony and to the ordinance were properly overruled.

The fifth assignment is to the rejection of proper testimony offered by defendant and in refusing to permit proper cross-examination of plaintiff's witnesses. As our attention is not called to these alleged errors in the argument, it is not necessary to notice this assignment.

The sixth assignment is to the refusal to give a peremptory instruction, directing a verdict for defendant. That instruction was properly refused. The testimony, it is true, is contradictory and conflicting but there was substantial evidence in the case entitling the plaintiff to go to the jury and that being so, we cannot interfere.

The seventh and eight assignments are to error in giving instructions 1, 2 and 3, asked by defendant, and in refusing instructions 2 and f, asked by defendant. We might decline to consider these assignments because of the language of the motion for new trial. The only attacks in the motion for a new trial, made upon the action of the court on instructions, are the fifth ground which is to the action of the court "in giving instructions to the jury as asked by plaintiff, duly objected to by defendant," and the sixth, "In refusing proper declarations of law asked by defendant."

In Raifeisen v. Young, 183 Mo. App. 508, 167 S. W. 648, it is held that a motion for new trial must set out the reasons therefor so definitely as to direct the attention of the trial court to the precise ground of complaint.

In Lampe v. United Railways Co., a decision by our court handed down April 2, 1918, being number 15,823, and not yet reported, the motion for new trial set out as its grounds, "Because the court erred in refusing to give and read to the jury legal and proper instructions requested by defendant, and because the court erred in giving and reading to the jury erroreous,

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illegal and misleading instructions on behalf of plaintiff and over defendant's objections thereto."

We held in that case that the sufficiency of these assignments had been before our Supreme Court in a number of recent cases and had been discussed at length in Wampler v. Atchison, T. & S. F. Ry. Co., 269 Mo. 464, 190 S. W. 908. In the Wampler Case an assignment somewhat similar to the one before us and now present was held sufficient in a civil case, the rule, however, differing in criminal cases. But in the recent case of Kansas City Disinfecting & Manufacturing Co. v. Bates County, not yet officially reported, but see 201 S. W. 92, an assignment in the motion for new trial, that the court refused proper declarations of law offered by plaintiff, was held not to be sufficient as an assignment of error in a civil case. Following this and in line with our own decision in the Lampe Case, we must hold that these assignments of error to the giving and refusing of instructions is insufficient. It is not out of place to say, however, that we have in this case examined the principal instruction given by the court at the instance of plaintiff and we find no error in it. It told the jury that if they found plaintiff was working for the defendant, and if they further found that while doing this on the third floor of the building " a piece of building material or other substance fell from some floor, or location, above and struck plaintiff, by reason whereof plaintiff was knocked, or fell, from the third floor of said building to the first floor thereof, and was injured; and if you further find and believe from the evidence that at, and immediately preceding, plaintiff's injuries, if any, the defendant failed to exercise ordinary care to have the joists or girders on each floor of said building above the second floor covered with scaffold boards, or other suitable material, as the building progressed, so as to sufficiently protect workmen; that is, to make it reasonably safe for workmen and for the plaintiff from falling through such joists or girders of said building, and to protect workmen, or make it reasonably safe for workmen, or plaintiff,

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who might be under or below the floors of said building from falling bricks, or other substances; and if you further find and believe from the evidence that such failure on defendant's part, if any you find, to have the joists or girders of each floor above the second floor of said building covered with scaffold boards or other suitable material to make it reasonably safe for workmen, or plaintiff, as the building progresses, was negligence; and if you further find and believe from the evidence that such negligence, if any, directly caused the plaintiff's injuries sued for herein, then you will find a verdict for the plaintiff in this case, providing that you further find that the plaintiff at the time of his injuries was exercising ordinary care for his own safety."

The court further defined "ordinary care," and rules for the measurement of damages, if there was a verdict for plaintiff.

We find no error then in either of these instruction, which were the only ones given at the instance of plaintiff.

Finding no reversible error, the judgment of the circuit court is affirmed. *Allen* and *Becker, JJ.*, concur.

STATE OF MISSOURI, ex rel. SAMUEL J. DOUGLAS, Relator, v. LEWIS T. TUNE, MERRELL P. WALBRIDGE, MAURICE J. CASSIDY and EDWARD C. MARSH, Respondents.

St. Louis Court of Appeals. Argued and Submitted March 20, 1918. Opinion Filed May 7, 1918.

1. **EVIDENCE: Confidential Communications to Public Officers: Privileged: Public Policy: Mandamus.** Under article 14, section 2, of the charter of the city of St. Louis, establishing a complaint board and authorizing such board to receive complaints against any department, board, division, officer, or employee of the city, and recommended to the proper city or state authorities any action deemed advisable, *held* that communications by citizens to the complaint board, covering the conduct of public officers and employees, are to

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be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated. [ALLEN, J., dissenting.]

2. ———: ———: ———: **Not Subject to Inspect and Copy nor Production: Mandamus.** Such complaint board were justified in their refusal to permit an inspection of a letter, which was made the basis of a libel suit against the sender, and in refusing to allow a copy to be made of it, and neither the appellate court, nor the circuit court in which the action for libel is pending, can compel the production of the letter for the purposes sought. [ALLEN, J., dissenting.]

MANDAMUS. ORIGINAL PROCEEDING.

ALTERNATIVE WRIT QUASHED, AND PERMANENT WRIT DENIED.

Douglas W. Robert for relator.

(1) The Complaint Board has no right to refuse the relator the right to inspect and copy the letter. It contained false charges against him. It is against public policy to make this Board a repository for libelonus letters. (2) (a) The question of privilege is for the defendants in the libel suit, not for the Board of Complaint. (b) In any event such letter is but conditionally privileged. Finley v. Steele, 159 Mo. 305; Newell Lib. and Slan. (2 Ed.), 475; 1 Cooley Torts (3 Ed.), 434. (3) (a) Production of papers under order of court does not constitute an unreasonable search or seizure. In re Dunn, 9 Mo. App. 225. (b) Even if this is a search or seizure, it is not unreasonable, as all the requirements of the Constitution have been complied with. Article 2, section 11. (c) Public records are always open to inspection by parties having an interest Burton v. Tinte, 78, Mich. 363; Boylan v. Warren, 39 Kan. 301; Brewer v. Watson, 61 Ala. 310; State v. Elsworth, 61 Neb. 444; State v. Williams, 110 Tenn. 549. (4) The relator has no adequate remedy at law. Remmers v. Remmers, 217 Mo. 561.

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Charles H. Daues and *Everett Paul Griffin* for respondent.

(1) The letter as described in relator's petition, charging relator with misconduct and with offences against the city ordinances and the State laws, is on the grounds of public policy, a privileged communication for the information of the Complaint Board, and cannot be furnished to outsiders unless it is deemed advisable by the Board and the persons writing the letter consent thereto. Furthermore, as the letter charges offenses against the city and State laws, and as it is the duty of the Complaint Board, after investigating a letter of the character described herein, to make recommendations to the city of State authorities, the Complaint Board has no authority to disclose the names of people giving it this information, nor to disclose the channels through which the information was obtained. Gray v. Pentland, 2 Serg. & Rawle (Penna.) 23; Yotur v. Sanno, 6 Watts Rep. 164, 166; Worthington v. Scribner, 109 Mass. 487; Rex v. Hardy, 24 Howell's St. Tr. 808-815; Boske v. Comingore, 177 U. S. 459; 4 Jones' Commentaries on Evidence, sec. 762; 4 Jones' Commentaries on Evidence, sec. 762, p. 480. (2) Even where a positive law requires public records to be kept and to be open to the inspection of the public, such records, if privileged, cannot be used in a trial between outside litigants, nor can they be examined or copies of them made, to be used as evidence in litigation. This has been held in the case of hospital records in Missouri and records of the Insane Asylum in Michigan. Smart v. Kansas City, 208 Mo. 162; Massachusetts Mutual Life Ins. Co. et al. v. Board of Trustees of the Michigan Asylum for the Insane, 144 N. W. 538. (3) This is not a proper case for mandamus because the Complaint Board acts in a quasi-judicial capacity. There is no law, charter provision, ordinance or otherwise, requiring the Complaint Board to allow the public generally, or any person outside the Complaint Board, to inspect a letter complaining about

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a city employee, or to allow such person to make a copy of the same. The Complaint Board is not charged with that legal duty. Mandamus will lie only where it is the clear legal duty of a person to perform a particular act. Even then mandamus is a discretionary writ. Ex parte Roland, 104 U. S. 604, 612, 617; State ex inf. v. Kansas City Gas Company, 254 Mo. 515, 531; State ex rel. v. St. Louis, 251 Mo. 274, 276; State ex rel. v. Appling, 191 Mo. App. 589, 592; State ex rel. v. Drury, 182 Mo. App. 100; State ex rel. v. Bank, 174 Mo. App. 589, 593. (4) This proceeding is an effort to determine questions by mandamus which should be determined on appeal or writ of error, and the effect of the court's decision, if against respondents, would be to determine the competency of evidence to be introduced on the trial of the libel suit in the Circuit Court. If the relator's position is correct and this alleged letter is competent evidence, he may obtain the same by a subpoena duces tecum in the circuit court on the trial of the case. His remedy in the circuit court, therefore, is adequate for his purposes. (5) The alleged letter, being a confidential communication to the Complaint Board, is not a public record, such as the record of a deed, but of a private and confidential nature, and to compel the respondents to produce said letter would be to violate the terms of the Constitution securing the people in their persons, papers, homes and effects from unreasonable searches and seizures. State ex rel. v. Trimble, 163 S. W. 860; Constitution of Missouri, sec. 11, art. 2.

REYNOLDS, P. J.—It is set out in the petition for a writ of mandamus now before us, that by section 2, of article 14, of the Charter of the city of St. Louis, a Complaint Board, consisting of three members, was created, with power in that board to employ a secretary. Setting out the section, it is averred that the respondents Tune, Wallbridge and Cassidy, are such board, and the respondent Marsh, its secretary, and that relator is an employee of the city of St. Louis in

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its streets and sewers department, and that one Lawence McDaniel and one George E. Thomas, on November 29, 1916, wrote a certain letter, addressed to the Complaint Board, and filed the same with that board, and that thereby that letter became a public document and part of the records of the city of St. Louis. Averring that the relator could not set forth accurately the language of the letter, relator sets out what he avers is the substance of it. It is further averred that the relator, on December 29, 1916, filed in the circuit court of the city of St. Louis, his action for libel against McDaniel and Thomas, in which he charged that the letter was written by them and that by reason of the writing of the letter, the Complaint Board, or some one acting for it, or under it, or pursuant to its direction, caused a police officer to arrest the plaintiff and he was taken to the City Dispensary by a police officer and thence to the City Hospital, in the city of St. Louis, where he was confined for a period of three days, to his damage, as he says, in the sum of $50,000. It is further averred that in that action it was necessary for the relator, as plaintiff therein, to accurately set forth the language used in the letter, which he contends is libelous; that through his attorney he called upon the defendants, as members of the Complaint Board, and demanded that he be permitted to inspect and make a copy of the letter; that the Complaint Board, not only by its several officers, but also acting at a meeting thereof, refused to permit the relator to make or have a copy of the letter; that thereupon the relator, plaintiff in the above-mentioned action against McDaniel and Thomas, gave due notice of his intention to take depositions, and applied to the division of the circuit court of the city of St. Louis, in which the cause was pending, for a subpoena *duces tecum,* commanding said Marsh, as secretary of the board, to appear at the taking of these depositions and bring with him the letter referred to; that Marsh duly appeared before the commissioner theretofore appointed to take depositions in the case but refused to produce the letter; that

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thereupon the commissioner duly reported to the court the refusal of the witness and asked that he be held in contempt until the letter was produced; that Marsh, by his attorney, acting under the direction of the Complaint Board, filed a motion to quash the subpoena on the ground that the circuit court had no authority to issue the same, which motion the circuit court sustained, as it is said in the petition, "on the authority of State ex rel. McCulloch v. Taylor, 187 S. W. 1181," (268 Mo. 312). Averring that a copy of the letter is necessary for the relator in the preparation of his action against McDaniel and Thomas, and will be necessary evidence at the trial of the case, and that there is liability that the letter may be lost between this time and the time the cause is set for trial, and that in that letter, the relator, an employee of the city of St. Louis, is charged with certain offenses, and for that reason is entitled to have an inspection and copy of the letter, and that the letter is a part of the public records of the city of St. Louis and for that reason the relator is entitled to have an inspection and make a copy, and that without a copy of the letter and the letter itself at the proper time, relator cannot prepare or try his action against McDaniel and Thomas, and that the relator is remediless in the premises by or through ordinary process or proceedings, he prays our court to award its writ of mandamus against respondents Tune, Walbridge, Cassidy and Marsh, commanding them to permit him, his agent, or attorney, to inspect or make a copy of the letter.

On presentation of this petition, an alternative writ of mandamus was issued.

Respondents, in their return, after admitting the allegations as to proceedings in the circuit court to obtain the production or inspection of the letter referred to, and averring that the Complaint Board was created by the terms and provisions of the Charter of the city of St. Louis in the interests of the city of St. Louis and for the betterment and improvement of the

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public service in the various departments of the government of the city of St. Louis, and that it would be against public policy and against the public interests for the Complaint Board, or its members, to disclose the contents of a letter or letters of the character described in the relator's petition, or to disclose the name or names of the writer or writers thereof, because such disclosure would deter people from making complaints which might be beneficial to the public interests and the public service, set up with great particularity why they should not be required to permit relafor or others to inspect or make copies of complaints filed with them, and denying the power of the court to make the order, or grant the relief asked; also claiming that if relator is entitled to any order for the production of any letter, his remedy is in the circuit court.

On this return being filed, relator moved for judgment and the cause has been duly submitted and argued.

This is the second time that this same case has been presented to us and writ prayed for as now. Considering it involved a matter beyond our jurisdiction, that is, construction of the Constitution of the State, and was ancillary to a suit for $50,000, which amount also placed the cause beyond our jurisdiction, we transferred it to the Supreme Court. See under this same title, 191 S. W. 1078, a decision not to be officially reported. It seems that counsel for relator, to avoid delay, dismissed that case in the Supreme Court and there commenced an original proceeding on the like petition. The Supreme Court issued its alternative writ, to which respondents made return, and on the cause being presented, the court vacated the alternative writ and dismissed the cause, holding that there was nothing disclosed by the record why the proceeding should not be brought in our court, saying of our court, in an opinion filed but not yet officially reported:

"That court has, under section 12, of article 6, of the Constitution, the same authority to issue writs of mandamus that this court has under section 3 of the same article, without otherwise limited by other pro-

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visions of the Constitution. That there is no such limitation in this case there can be no question for the reason that neither the subject-matter of the libel suit mentioned, nor the amount involved therein is involved in this case. This is a collateral proceeding to that action, merely involving the right of the relator to compel the Board of Complaint to produce the letter mentioned for his inspection and use as evidence in said libel suit."

Relator thereupon instituted the present proceeding in our court, we issuing an alternative writ of mandamus.

Article 14, of the present charter of the city of St. Louis, adopted by vote of the people June 30, 1914, is headed, "Public Welfare Boards." Under the first section provision is made for the administration of the Mullanphy Fund. The second section is as follows:

"Sec. 2. There is hereby established a complaint board to consist of three members to serve without compensation. Said members shall be appointed by the mayor for terms of one, two and three years, respectively. Each year thereafter the mayor shall appoint one member for a term of three years. Members shall hold office until their successors qualify. Said board shall employ a secretary, and may appoint such other employees as may be provided by ordinance. It shall receive complaints against any department, board, division, officer, or employee of the city, or against any public utility corporation, and examine the same. It shall recommend to the proper city or state authorities any action deemed advisable."

The third section makes provision for other boards and institutions. The respondents are the members and secretary of the complaint board.

Assuming that the board has in its possession a letter such as described in the petition and alternative writ, and said to be described in the petition in the action in which the relator here is plaintiff and Lawrence McDaniel and George E. Thomas are defendants, lodging some sort of complaint against relator as a

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city employee, the sole question for our consideration is, whether in this proceeding, we can compel the respondents to permit the relator or his attorney to examine and make a copy of that letter.

Our conclusion is that he is not entitled to any such order.

The learned counsel for the relator suggests that the question here involved is a matter of privilege which cannot be set up by the respondents; that such a defense belongs solely to the defendants in the libel suit and that the libel action is not now being tried. Concede this: The very gist of the case, however, is whether these respondents, the complaint board and its secretary, officers of the city of St. Louis, can be compelled to furnish a copy of a letter said to have been lodged with them, making charges against a city employee. It is they, as public officers, who claim the privilege, and properly so. As we understand the provisions of section 2, of article 14, of the charter of the city of St. Louis, the Complaint Board was established for the very purpose of promoting efficiency in the public service. That board is authorized to receive complaints against any department, board, officer, or employee, of the city and examine into the same. It has no power to take any action of itself. All that its power, after investigation and inquiry, consists of, is, to recommend to the proper city or State authorities any action deemed advisable as to city employees and officers or public service corporations. They serve without compensation. In the very highest sense, they are the confidential servants of the city and of its officers, for the purpose of advising those officers as to the character, fitness, ability and suitability of the various employees of the city, as well as of the acts of public utility corporations. We can conceive of no higher, more important, and useful branch of public administration than the duties thrown upon this Complaint Board. It is almost a necessary implication, when we consider the creation and objects and scope of this board, that communications from citizens, complaints

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from citizens, are the main source for putting the powers of inquiry of the board into play. Surely this provision of the charter does not contemplate that the members of the board, who are serving without compensation, are to go around, of their own initiation, and investigate into and inquire as to all of the several officers and employees of the city, consisting of thousands of individuals. They must rely almost entirely upon information voluntarily given to them by citizens, who may have knowledge of the conduct and character and fitness of city employees. The creation of the board, in itself and in a measure, invites complaints from citizens of their officers and of public employees. If every citizen who knows of the unfitness of an officer or employee, or of facts he thinks require an investigation, believes it his duty to lodge information before the board, he will hesitate a long while before doing so if he knows his complaint is to be made public and become of the public records, so that any one may have access to it and be subjected to action for a possible libel. It is not to be expected, if that is so, that very many will come forward and lodge a complaint. We think that if it was understood that the complaints lodged by citizens against these employees were to become public property, without the consent of the party filing them, that the very object for which this board is created would be defeated. It may be that in sealing the records, so far as relates to these complaints, from public inspection, some individual will be hurt, but the right of that individual must yield to the right and to the benefit of the public at large. In our opinion these communications by citizens to the Complaint Board, covering the conduct of public officers and employees, are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated. Such is said to be the law where the question has been very fully considered in a recent work on evidence, namely, Jones' Commentaries on the Law of Evidence in Civil Cases, vol. IV, sec. 762, p. 576, to which, without re-

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peating or reproducing, we refer. There the case of Boske v. Comingore, 177 U. S. 459, is referred to and quoted at length as sustaining the confidential character of such communications.

In Gray v. Pentland, 2 Serg. & Rawle 23, the Supreme Court of Pennsylvania held that accusations preferred to the Governor of the State against a person in office are, so far of the nature of judicial proceedings, that the accuser is not held to prove the truth of them; that it is excused if they did not originate in malice and without probable cause, and that parol evidence cannot be given of the contents of a libelous deposition sent to the Governor containing charges against an officer of his appointment in an action for libel, though the court has refused a *subpoena duces tecum,* and that the Governor, to whom such a deposition is addressed must exercise his own judgment with respect to the propriety of the production of the writing. This same principle was subsequently recognized as sound by the Supreme Court of Pennsylvania in Yoter v. Sanno, 6 Watts 164, l. c. 166.

In Worthington v. Scribner, 109 Mass. 487, Judge Gray, afterwards Mr. Justice Gray of the Supreme Court of the United States, held (l. c. 488):

"It is the duty of every citizen to communicate to his government any information he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the

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witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

While we have no decision of our courts that directly meets this proposition, we have its spirit applied in Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709. There it was held that a hospital physician who attends a patient at the hospital not only cannot testify as to what he learned of the patient's condition while so attending her, but that the official hospital record, into which has been copied the diagnosis of the case, is privileged and not admissible in evidence. It is further there held that the fact that the city ordinances require such records to be kept furnish any reason why the statute against disclosure of privileged communications should be violated. That opinion is not altogether germane to the case before us but is illustrative of the rule as to privileged communications. In line with this decision of our Supreme Court is that of Massachusetts Mutual Life Ins. Co. v. Board of Trustees of Michigan Asylum for the Insane, 178 Mich. 193, 144 N. W. 538.

Our conclusion is that the respondents here were justified in their refusal to permit relator to have an inspection of the letter, assuming such letter was in their control, and in refusing to allow the relator to make a copy of it. That is as far as we go in this case, except to say that neither our court nor the circuit court in which the action for libel is pending, can compel the production of the letter for the purposes sought by relator. Whether the circuit court, in which the action for libel is pending, can proceed with the case, in the absence of the original letter and allow parol testimony to be given as to its contents, is a question which is not now before us and which we do not decide. The alternative writ heretofore issued is quashed and a permanent writ denied. *Becker, J.*, concurs. *Allen J.*, dissents.

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THE STATE OF MISSOURI, Respondent, v. WILLIAM GOLDMAN, Appellant.

St. Louis Court of Appeals. Submitted on Record April 3, 1918. Opinion Filed May 7, 1918.

1. **CRIMINAL LAW: Appellate Practice: Absence of Bill of Exceptions: Review.** On appeal in a criminal case in the absence of a bill of exceptions, the appellate court is confined to an examination of the record proper.

2. **———: Indictment and Information: Lotteries: Sufficiency of Information: Following Language of Statute.** An information charging that defendant willfully and unlawfully did sell, to a person whose name to the informant was unknown, a certain ticket and part of a ticket in a lottery and device in the nature of a lottery known as "country store," contrary to the form of the statute, etc., substantially following the language of Revised Statute of Missouri, section 4771, was sufficient.

3. **———: ———: Absence of Bill of Exceptions: Presumptions.** On appeal in a criminal case in the absence of bill of exceptions bringing up the evidence, the appellate court is confined to the single question of whether the information will support the judgment of conviction, for it must assume that the evidence and course of trial justified the finding and judgment, if the information charged the commission of an offense.

4. **———: Appellate Practice; Sufficiency of Information: Bill of Exceptions.** To enable the appellate court to consider the sufficiency of an information, it is not necessary that there be a bill of exceptions.

Appeal from St. Louis Court of Criminal Correction.—*Hon. Calvin N. Miller,* Judge.

AFFIRMED.

Paul Dillon for appellant.

Howard Sidener, Prosecuting Attorney, for respondent.

REYNOLDS, P. J.—The appellant in this case was proceeded against in the Court of Criminal Correction

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of the city of St. Louis on an information which charges that in the city of St. Louis, on November 19, 1914, he "wilfully and unlawfully did sell to a person whose name is to this informant unknown, a certain ticket and part of a ticket in a lottery and device in the nature of a lottery, known as 'Country Store,' contrary to the form of the statute," etc. Arrested and arraigned defendant pleaded "not guilty," and his counsel, along with the prosecuting attorney filed an agreed statement of facts,which statement of facts, it is set out, is taken by the court as submitted. The cause was continued from time to time and resulted in the court finding and adjudging the defendant guilty and assessing his punishment at a fine of $50. It is stated that a motion for new trial was filed and overruled, as also a motion in arrest of judgment, and thereupon the fine was duly adjudged and imposed upon defendant, who prayed an appeal to our court.

We have before us no bill of exceptions and nothing but the entries above referred to. This confines us to an examination of the record proper, which here consists of the information, finding or verdict and judgment.

This proceeding is under section 4771, Revised Statutes 1909, which provides:

"Any person who shall sell or expose to sale, or cause to be sold or exposed to sale, . . . or shall aid or assist, or be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, . . . or device in the nature of a lottery, within this State or elsewhere, . . . and shall be convicted thereof in any court of competent jurisdiction shall, for each and every such offense, forfeit and pay a sum of not exceeding $1000."

It will be observed that this information, in charging that the defendant "wilfully and unlawfully did sell . . . a certain ticket and part of a ticket in a lottery and device in the nature of a lottery, known

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as 'Country Store,'" etc., substantially followed the language of the statute.

It was long ago decided by out Supreme Court, as see Freleigh v. The State, 8 Mo. 606, that where the charge in the information, a misdemeanor, is in the very language of the statute, it is sufficient. No decisions overturning that have been called to our attention, or of which we are aware, have ever disturbed that. We therefore hold that the information in this case is sufficient.

In the absence of a bill of exceptions, bringing up the evidence, as is the case here, we are confined to the single question of whether the information will support the judgment; for we must assume that the evidence and course of the trial justified the finding and judgment, if the information charged the commission of an offense. Here that is challenged.

To enable us to consider the sufficiency of an information it is not necessary that there be a bill of exceptions. We examine an information on appeal without that, and here conclude that the information is sufficient.

Finding no error in the record proper it follows that the judgment of the court of criminal correction must be and it is affirmed. *Allen* and *Becker, JJ.*, concur.

SARAH H. LANCASHIRE, Appellant, v. THE GARFORD MANUFACTURING COMPANY, Respondent.

Kansas City Court of Appeals, April 29, 1918.

LANDLORD AND TENANT: Constructive Eviction: Nuisance. Where a tenant rents a part of a building and the landlord thereafter rents another part of said building to another tenant for a lawful purpose from month to month not knowing the character of the tenant, and afterwards a nuisance, such as a house of prostitution, is maintained by the landlord's sufferance, connivance or consent,

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by reason of the fact that the landlord learns of the house of prostitution and fails, upon complaint of the first tenant to put out the objectional tenant, the landlord is guilty of a constructive eviction of the first tenant who is forced to move on account of the said nuisance.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner,* Judge.

AFFIRMED.

Lathrop, Morrow, Fox & Moore for appellant.

Kennish & Smith and *O. M. Edmondson* for respondent.

BLAND, J. —This is a suit for rent. The judgment and verdict was against plaintiff and she has appealed.

The evidence shows that plaintiff was the owner of premises located at 1708-10 Walnut Street, Kansas City, Missouri. These premises consisted of a two-story brick building. On the lower floor were two storerooms and the entire upper floor was made up of rooms rented out for boarding house or hotel purposes. On August 13, 1914, plaintiff by written lease demised to defendant one of the storerooms for a period of two years from April 1, 1914. The rooms on the second floor were vacant when defendant moved into the premises, about April 1, 1914, and remained vacant until December of that year when they were rented by plaintiff's agent to a Mrs. Anna Murphy, a woman of bad reputation for chastity. About March 1, 1915, Mrs. Murphy telephoned plaintiff's agent that she had sold out to a Mrs. Clara Davis, another woman who was a notorious prostitute.

Without going into the evidence in detail it is sufficient to state that it shows without any doubt that the place was conducted by the Murphy and Davis women as a house of prostitution and under the

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management of the latter it became a notorious bawdy-house where thieves resorted. The evidence shows that the boisterous conduct of the inmates of the upstairs rooms was such as to be heard by the employees of the defendant; that there was an electric piano almost continually in operation; that women would shout down the rear stairway soliciting men from the alley; that automobiles and taxicabs stopped in front of defendant's place of business at all times of the day and night and men and women in a drunken condition were taken therefrom to the upstairs, and that almost daily beer by the case was delivered through the back stairway. At one time the place was raided by the police. The upstairs had many windows on all sides and the storeroom occupied by the defendant likewise had large windows and openings. Defendant had several men employees and two or three young ladies.

Defendant complained to plaintiff's agent of the tenants upstairs in the spring of 1915 and the agent promised that if conditions continued he would see that the upstairs tenants were put out. These were tenants from month to month. In April or May, 1915, defendant's manager testified that "they had apparently had a hilarious time upstairs, and had allowed water to run, and flooded our storeroom, and a large piece of the ceiling fell." Thereupon defendant's manager called up plaintiff's agent and described what had taken place and told him that the defendant could not stand the conditions any longer and that they would have to be changed. During this conversation defendant's manager explained to plaintiff's agent the character of the place being conducted upstairs. Plaintiff's agent did nothing to remedy the evil but instead he stated that he thought defendant's manager must be mistaken; that he had never heard any adverse reports; that he thought everything would be all right.

About the middle of July a woman rushed downstairs into defendant's office clad in a Kimona only, called up the police, and with a long oath stated to

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the police that some "fellow" was trying to shoot her. The oath used involved the mother of the person who was trying to do the shooting and was uttered in the presence of two young lady stenographers employed by defendant. The next day defendant's manager called up plaintiff's agent and told him about this last incident and said, "This is the last; we cannot stand it any longer and will simply have to move out." He told plaintiff's agent that he would come down to see him, which he did the next day. At this last interview with plaintiff's agent the agent told defendant's manager that he (the agent) had to be very careful about preferring charges against a tenant, saying that he had had an experience of that kind once and that it cost him a lawsuit and that he had trouble in proving his statement. However, he told defendant's manager that he had mailed a notice the day before notifying the Davis woman to vacate on or before September 1, 1915. Defendant immediately vacated the premises, defendant's manager giving as the reason therefor that he had no assurance that plaintiff's agent would be able to get the Davis woman out on account of plaintiff's agent expressing doubts about the matter, as detailed above.

Plaintiff's contention is that there was no eviction of defendant from the premises and that defendant, having voluntarily moved, is responsible for the rent for the balance of the term. The general rule as to what constitutes eviction, under circumstances such as those presented in this case, is stated in 11 Amer. and Eng. Ency. of Law, p. 471 (2 Ed.), and approved by the St. Louis Court of Appeals in Delmar Investment Co. v. Blumenfield, 118 Mo. App. l. c. 318, as follows:

"An eviction is not necessarily an actual, forcible taking possession of the demised premises by the landlord, nor does it necessarily consist in the expulsion of the tenant or a physical interference with the demised premises; nor need it be attended with a denial or refusal to permit the tenant longer to occupy the premises under the lease. Any intentional and

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injurious interference by the landlord or those acting under his authority, which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction."

That an eviction is not necessarily an actual, forcible taking possession of the demised premises by the landlord but may be established by showing an intentional or injurious interference by the landlord, or those acting under his authority, which deprives the tenant of the beneficial enjoyment of the demised premises is generally recognized by the authorities. [2 Tiffany on Landlord and Tenant, p. 1282; 1 Taylor on Landlord and Tenant (9 Ed.), section 309a; 2 McAdam on Landlord and Tenant (4 Ed.), sec. 404; Dyett v. Pendleton, (N. Y.), 8 Cowen 727; Jackson v. Eddy, 12 Mo. 209; Delmar Investment Co. v. Blumenfield, supra; French v. Pettingill, 128 Mo. App. 156.]

As stated in French v. Pettingill, supra, l. c. 160, the courts of this State have declined to frame a rule of general application by which to determine what amounts to a constructive eviction of a tenant and it is almost impossible to lay down any general rule with reference to this matter, as it is often difficult to determine just what acts or conduct on the part of the landlord amounts to an eviction. It was held in French v. Pettingill, supra, where the landlord rented a portion of the premises for club purposes and the club maintained a bowling alley and a restaurant where drinks were served, about which persons congregated and became intoxicated and late at night used loud and profane language which disturbed the peace and quiet enjoyment of the defendant who was the plaintiff's tenant in another portion of the premises, that there was no showing that the landlord intended to authorize the use of the premises for disgraceful or immoral purposes and that there was no eviction, there being no proof that the landlord was in any way responsible for the disorder on the premises. There was no com-

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plaint made to the landlord and there is nothing in the opinion to show that the landlord even knew, before the tenant in that case moved out, of the conditions present.

It is stated by Tiffany on Landlord and Tenant, supra, p. 1282, that where a portion of the premises is used by another tenant for prostitution or gambling, there is no eviction of the adjoining tenant where the landlord had no reason to suspect, at the time of making the lease, that the disreputable tenant would be guilty of such improper use, he having no greater power than the tenant subsequently to prevent it. However, the rule stated by Tiffany seems to contemplate that the disreputable tenant must be holding under an unexpired written lease which does not permit his removal by the landlord by a simple notice to quit, such as is provided by the laws of this State where the renting is from month to month. Otherwise, why would it have been stated that the landlord had no greater power than the complaining tenant to subsequently prevent the nuisance? However, it is the rule in this State that if it is shown that the landlord consents to or connives at a nuisance of this kind, there is no duty on the part of the tenant to do anything towards abating it.

It was stated by Judge SHERWOOD in the case of Paddock v. Somes, 102 Mo. l. c. 239, that where a person is deprived of the exercise of enjoyment of a legal right by some nuisance, he is not required "to spend a dollar" or to make any exertion whatever to abate the nuisance.

It is apparent that the landlord cannot say that there has been no eviction merely because he did not rent the premises for an unlawful purpose. If he leases the premises, not knowing the character of the tenant and for a lawful purpose and afterwards a nuisance, such as a house of prostitution, is maintained by the landlord's sufferance, connivance or consent, then he has been guilty of a constructive eviction of

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a tenant who is forced to move on account of the nuisance. [Wilheim v. Baxter, 46 Colo. 155; 1 Taylor on Landlord and Tenant (9 Ed.), sec. 316; McAdam on Landlord and Tenant (4 Ed.), sec. 404.

There is no evidence in this case that plaintiff's agent at the time he rented the upstairs portion of the premises to the Murphy and Davis women knew of their disreputable character. However, on two different occasions in the spring of 1915, his attention was called to what was going on there and he took no steps whatever to put them out, although they were tenants from month to month. The place that the Davis woman was running was of such a notorious character that plaintiff's agent must have known what was going on even without notice to him of the conditions by defendant's manager. However, there is no question in this case but what plaintiff's agent knew of the existence of the nuisance and connived at it and permitted it to exist. Under the facts in this case we think it must be said that he permitted the nuisance to exist although he had ample opportunity and the power to abate it.

Plaintiff contends that defendant should have remained on the premises and awaited the result of the agent's efforts to get the Davis woman out of the premises. The Davis woman moved out a few days after the giving of the notice by plaintiff's agent but after defendant had notified plaintiff's agent that he would vacate and move elsewhere. Defendant's manager had twice complained of the condition present before the third and last time, after which he moved out. As before stated, nothing was done to abate the nuisance until defendant notified plaintiff's agent that he would vacate the premises. At this time plaintiff's agent instead of giving defendant definite assurance that he would put the disreputable tenants out, beclouded the matter by expressing doubt as to ability to get the Davis woman out of the premises. If defendant had suffered a constructive eviction, we see no reason why it should, before making arrange-

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ments to move elsewhere, await the result of an effort on the part of the landlord to get the disreputable tenant out, at least, where it was shown that the landlord was offering some lame excuse why he might be frustrated in his efforts to remove the objectionable tenant and thus abate the nuisance.

We think it clear that the conduct of plaintiff's agent in permitting this nuisance, which was of a most objectionable and disgraceful character, amounted to a constructive eviction of defendant, that the defendant was within its rights in vacating, and that this action cannot be maintained for the rent for the balance of the term.

The judgment is affirmed. All concur.

KENDALL B. RANDOLPH, Respondent, v. ST. JOSEPH GAS COMPANY, Appellant.

Kansas City Court of Appeals, April 29, 1918.

1. **MANDATORY INJUNCTION: Equity: Submission of Issue of Fact to Jury.** Plaintiff refused to pay a gas bill claiming that it was exorbitant. Defendant thereupon shut off his gas. Plaintiff then applied for and obtained a restraining order which afterward became a temporary injunction. Thereafter defendant filed an answer to the merits and the court then made an order that issues of fact be framed between plaintiff and defendant for submission to the jury. Defendant declined to do this and the court thereupon ordered the temporary injunction made permanent. It was *held*, that the trial court erred in rendering judgment against defendant without a hearing.

2. **———: Framing Issue of Fact for Jury: Equity.** Issues of fact for submission to a jury in equity cases may be prepared by the court, or counsel under the direction of the court, or may be prepared by counsel and submitted to the court for approval and where the court directs counsel to prepare such issues it is their duty to make a bona-fide effort to comply.

Appeal from Buchanan Circuit Court.—*Hon. William H. Utz,* Judge.

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REVERSED AND REMANDED.

William E. Stringfellow for appellant.

Lewis F. Randolph for respondent.

BLAND, J.—Defendant was a Gas Company distributing gas in the city of St. Joseph, Missouri, and plaintiff was a consumer of defendant's gas. Defendant rendered plaintiff a bill for gas consumed in November, 1916, which plaintiff contended was exorbitant, and upon his refusal to pay the same the defendant shut off his gas. Thereupon plaintiff filed a petition in the circuit court of Buchanan County praying that a madatory injunction be issued restraining the defendant from refusing to furnish gas to plaintiff and requiring defendant to restore gas to plaintiff's premises. A temporary restraining order was issued against the defendant which afterwards became a temporary injunction.

On March 14, 1917, defendant filed an answer to the merits and on March 29, 1917, the court ordered "that issues be framed between plaintiff and defendant, to be submitted to a jury for their findings and advice as to what amount, if any, is owing by plaintiff to defendant on the gas bill mentioned in the pleadings.

Now here in open court the defendant declines to frame an issue for a jury, as required by the above order of this court, and defendant suggests to the court that such order by the court is in excess of the court's jurisdiction and the court orders this cause continued until the next May term of this court, and pending said proceedings the injunction heretofore granted shall remain in force."

And afterwards the defendant took a change of venue and the case was transferred to Division 3, of the circuit court of Buchanan county, whereupon the following proceedings were had:

"Now on this 23rd day of November, 1917, this cause coming on regularly to be heard in Division 3 of the cir-

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cuit court of Buchanan county, Missouri, the defendant files a paper purporting to be an issue under the order of Division No. 1 of the circuit court of Buchanan county Missouri, heretofore made; and comes now the plaintiff and files his motion to strike out said paper, with said motion, by agreement of parties, is by the court taken up, seen, heard, read and sustained, and the defendant thereupon in open court declining to plead further, or to frame an issue to be tried by a jury, in accordance with the order of the court heretofore made, it is ordered that the temporary injunction heretofore granted is by the court made permanent."

In an equity case the court has power to submit an issue of fact to the jury. The issue to be so submitted may be prepared by the court, or by counsel under the direction of the court, or may be prepared by counsel and submitted to the court for approval, (2 Ency. of Pleadings and Practice, 667) and we think that where the court directs counsel to prepare an issue it is the duty of counsel to make a bona-fide effect to comply with the direction. The case evidently was tried on the theory that it was the defendant who was ordered to prepare the issue so we will decide the case here upon that theory.

It seems to be conceded by the parties that the only theory upon which the court could have taken the drastic action of rendering judgment against the defendant without a hearing was that the defendant in refusing to frame a further issue was guilty of contempt of court. Whether it is true that a party who has been adjudged as in contempt in disobeying the order of a court of competent jurisdiction can have no standing in that court for any purpose in the absence of a statue on the subject, is a question upon which the courts of this country are not entirely in accord (see Hovey v. Elliott, 167 U. S. 409), and upon which we do not rule. Whether a party may be so punished for the misconduct of his attorney is even a more serious question. But the right of a party to be heard, either in a civil or a criminal action, is a high one and the grounds

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upon which he is deprived of it must clearly appear from the record and must not be left in doubt or to inference. We do not pass upon the question as to whether defendant could be adjudged as in contempt of court for the failure to prepare an issue at the direction of the court, as the record in this case does not show any adjudication that defendant was in contempt of court, nor does it show that the court found defendant in contempt. Uner such circumstances the action of the trial court in rendering judgment against the defendant without a hearing cannot be upheld. [Andrews v. Knox County, 70 Ill. 65.] Of course we do not mean to intimate that in any event judgment could be rendered in favor of plaintiff without he first prove up his case, if the burden of evidence is upon plaintiff.

As this case must be retried, we may say in passing that we cannot see any good reason why the court and counsel cannot agree upon a satisfactory issue to be submitted to the jury upon an issue so simple.

The judgment is reversed and the cause remanded. All concur.

VIOLA MOORE, Respondent, v. WILLIAM DOERR, et al., Appellants.

Kansas City Court of Appeals, April 29, 1918.

1. **VOIR DIRE: Improper Questions: Prejudice.** A woman and her husband were defendants in an action for assault and battery. Plaintiff's counsel in examining jurymen on their *voir dire* was permitted to ask them if they knew the woman-defendant's father, calling him by name and designating him as "the gambler." It was *held* to be error.

2. **HUSBAND AND WIFE: Torts of Wife: Statute: Common Law.** The following statute was enacted in Missouri in 1915: "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be

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jointly responsible with her, if the marriage did not exist." It was *held*, that this statute repealed the common law, as to torts of the wife and put liability on her where formerly it did not exist, and took liability from the husband where formerly it did exist.

Appeal from Jackson Circuit Court.—*Hon. William T. Johnson,* Special Judge.

REVERSED AND REMANDED.

Henry L. Jost for appellants.

Williams, Guffin & Field and *C. S. McLane* for respondent.

ELLISON, P. J.—This action is for damages alleged to have resulted to plaintiff from an alleged assault and battery. The judgment in the trial court was for the plaintiff.

When the panel of jurors were being examined on their *voir dire* plaintiff counsel asked them if they knew "Ed Findley the gambler who is the father of Mrs. Doerr one of the defendants in the case." They likewise stated to the panel that it would be shown that Mrs. Doerr, since the suit was brought had conveyed a large amount of property "to Mrs Findley the wife of Ed Findley, the gambler." These questions and statements were improper. They evidently were asked for the purpose of prejudicing the jury against the defendants. The natural effect was to draw attention of the jury to Findley instead of the defendants and the tendency was to substitute him for defendants. On another occasion we said that, "A litigant has a right to his own personality" and the opposing party "cannot ask unliquidated damages of a good man who may have injured him and then substitute a bad man at the trial." [Gore v. Brockman, 138 Mo. App. 231, 235.] So it was ruled that the question "Do you know Mr. Frank V. Johnson, attorney for the Fidelity Insurance Company in this case, was most prejudicial," and a new trial was granted. [Cunningham v. Heidel-

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burger, 95 N. Y. Sup. 554.] Prejudicial foreign matter ought not to be introduced into the case. [Theobold v. Transit Co., 191 Mo. 395, 416; O'Hara v. Construction Co., 197 S. W. 163, 165; Beck v. Railroad, 129 Mo. App. 7, 24; Billmeyer v. Transit Co., 108 Mo. App. 6, 10.]

Nothing we have said is intended to prevent counsel from learning the relationship or connection, business or otherwise, which a juryman may have with a litigant; or from gaining all proper and needful information which will tend to legitimately aid him in making challenges, but this right may be abused as in this case, by unnecessary and prejudicial matter. A question whether the juryman was acquainted with Ed Findley, father of one of defendants, would have served every rightful purpose, without the added stigma.

A demurrer to the evidence for plaintiff was presented by Mrs. Doerr and refused by the trial court. This involves the following recent statute found in the Session Acts of 1915, p. 269; "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her, if the marriage did not exist." We interpret this statute as putting liability on the wife in instances where formerly it did not exist, and taking liability from the husband in instances where formerly it did exist. It means the overthrow of the common law frequently announced in this State, viz, that the wife was not liable for torts committed in the presence of her husband, presumably under his coercion, and that the husband was liable for her torts, whether committed in, or out of his presence. It substitutes for such common law, a liability of the wife for torts committed by her, whether in his presence or not, and also a non-liability of the husband in all instances where he would not have been liable had he not been her husband.

The acts of the husband in this case are to be judged as they should be were he not Mrs. Doerr's

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husband; and unless he joined in the assault, or otherwise encouraged, aided and abetted her, the judgment should be for him.

The statute has not been before the courts so far as we are advised except in Claxton v. Pool, 197 S. W. 349. It was there considered by Commissioner White, but the wrong in that case was committed prior to the enactment of the statute. It was held that, on account of the various changes in the property rights of married women, as evidenced by different statutes as well as customs, the reason for the common-law rule had ceased and the rule itself should cease. The opinion in that respect is avowedly opposed to Nichols v. Nichols, 147 Mo. 387, 407; Taylor v. Pullen, 152 Mo. 434 and other cases. The Commissioner then refers to this statute, as having been enacted with a view of settling the doubts which seem to have harrassed the courts, and says that it "relieves the husband from liability for injuries committed by a married woman, except in cases where he would be jointly responsible if the marriage did not exist."

It is true that of the three members of that division of the Supreme Court, Judge WILLIAMS concurs in the opinion of the Commissioner, Judge FARIS concurs in the result and Judge WALKER dissents. Therefore the opinion may be said not to be binding authority. But we assume the dissent of Judge WALKER and the doubts of Judge FARIS, are based upon that part of the opinion in reference to the rule of common law having been abolished before the statute of 1915 was enacted.

Other questions were presented by counsel, but as the case is to be retried, they may not arise again. The judgment is reversed and the cause remanded. All concur.

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ST. JOSEPH & GRAND ISLAND RAILWAY CO., Respondent, v. ELWOOD GRAIN CO., Appellant.

Kansas City Court of Appeals, April 29, 1918.

1. **RUNNING ACCOUNT: Intention: Limitations.** Plaintiff residing in Kansas had claims against the defendant for demurrage and for freight charges. As these charges accrued plaintiff presented them to defendant, who rejected some and paid others. The evidence showed that these claims were not intended to constitute one running open account. It was *held* that the last item within the statute of limitations would not save the earlier items which were without the statute from the bar of limitations.

2. **STATE OF LIMITATIONS: Remedy: Statute of Forum.** The Statute of Limitations pertains to the remedy and the law of the forum applies except where there is a statute in the State where the remedy is sought, which applies the statute of the foreign State; such as Sec. 1895, R. S. 1909, of the Missouri statute.

3. **FOREIGN STATE: Limitations: Statute Applying Foreign Limitations.** A cause of action arose and accrued in the State of Kansas. The creditor resided in that State and the debtor resided in Missouri. The Statute of Limitations in Kansas was for three years for such claims, while that in Missouri was five. It was provided in Sec. 1895, R. S. 1909, of the Missouri statute that when a cause of action accrued in a foreign State and was barred by the limitations in that State it should likewise be barred in Missouri. It was *held* that the cause of action being barred in Kansas, was also barred in Missouri.

4. **LIMITATION: Estoppel.** If a defendant verbally agrees, on valid consideration, not to plead the Statute of Limitations, he will be estopped from pleading it. But such promise should be pleaded and proven. Mere request not to sue made by a debtor to a creditor will not sustain an estoppel.

Appeal from Buchanan Circuit Court.—*Hon. Thos. B. Allen,* Judge.

REVERSED AND REMANDED.

John E. Dolman and *O. E. Schultz* for appellant.

Robert A. Brown and *Richard L. Douglas* for respondent.

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ELLISON, P. J.—Plaintiff's action is based on an account for demurrage, for freight due from defendant and for switching service. The cause was referred to a referee who found for the plaintiff $476 for demurrage and $85.04 for freight. The charges for switching were disallowed. The circuit court approved the referees report and judgment being rendered for plaintiff, defendant appealed.

Plaintiffs account arose primarily from the building of an elevator at Elwood, Kansas, by the defendant near by the tracks of plaintiff's railway. A lengthy contract was drawn between them relating to shipments of grain, and also of a variety of kinds of material used in the construction of the elevator, and repairs thereon. The contract gave defendant various privileges and rights. Out of this grew plaintiff's claim. The question in the case involves the Statute of Limitations of Kansas and Missouri, and, also, what constitutes a running account; and incidentally, whether there is an estoppel against defendant.

The action was begun on the 19th of September, 1914. The account for demurrage began December 7, 1907, and continued down into 1912, a date within the three-year period of limitation prescribed by the Kansas statute. The freight item for four cars of sand, is dated August 6, 1907. The limitation period in Kansas is three years and in this State it is five, the suit having been commenced on the 19th of September, 1914, defendant insists that all items of date more than three years prior to that time, are barred by the Kansas statute, and, as we shall presently see, also by our statute. If defendant is correct, then the freight charge and the principal part of the demurrage charge ought not to have been allowed against it. But plaintiff contends that its entire account was one single matter, made up of different items, that is, that it was an open running account and that the Statute of Limitations did not begin to run until the date of the last item in 1912, which

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was less than three years before the suit was brought. So this phase of the case depends on the character of the account.

The law in this State is that when the account is a continous "running account, and it is fairly inferable from the conduct of the parties while the account was accruing, that the whole was to be regarded as one, as in the case of a merchants account against a customer, none of the items are barred by the statute unless all are." [Ring v. Jamison, 66 Mo. 424, 428; Chadwick v. Chadwick, 115 Mo. 581, 586; Sidway v. Land and Live Stock Co., 187 Mo. 649, 669.]

This leaves to be determined whether, while this claim was accruing, the parties regarded it, and understood it, as constituting one claim, as is the case, for example, of an ordinary merchant's account against a customer. We think it clear from the evidence showing the conduct of the parties, that it was not so understood at that time. For it appears that it was the practice of the plaintiff to render to defendant from day to day, as the service was had, an itemized statement of what was due the plaintiff; that defendant would take such statements, go over them and check off the items which it considered it owned and that it proposed to pay. It would then make out its check to plaintiff for such items, together with a statement of the particular items it was paying and plaintiff then entered on its books as paid, the items so designated by defendant. It appeared in evidence that the items which defendant repudiated were such as it insisted it did not owe under its contract, and for various other reasons. It seems to us apparent that neither of these parties regarded plaintiff's claim at the time of the transactions upon which it is founded, as an open continuous account made up of different items constituting one.

The evidence in plaintiff's behalf shows conclusively that as each service in suit was performed it was then regarded by plaintiff as an accrued claim for which a bill was made out and payment refused by defendant. It must be borne in mind that the bills made out and

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sent to defendant when the service was performed were not mere memoranda for the information of the purchaser of an account and a credit, the account to continue on, but they were statements of accounts then due for specific charges and payment then demanded. But though not a running open account whereby the last item within the period of limitation would save those older items which are without that period, any of plaintiff's claims that are within the period may be recovered, and we must consider the case from that standpoint. The claim originated in Kansas and was to be performed in that State. Uninfluenced by a statute to the contrary the limitation law of the former (which governs the remedy) applies. But in this State, since the revision of 1899, as we shall presently see, we have had a statute to the contrary. [Sec. 1895, R. S. 1909.]

He must therefore inquire whether plaintiff's claims are barred by the Statute of Limitations of Kansas (prescribing a period of three years).

In this State we have a statute (Sec. 1897, R. S. 1909) excepting certain situations from the general provisions. It reads as follows: "If at any time when any cause of action herein specified accrues against any person who is a resident of this State, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the State; and if, after such cause of action shall have accrued, such person depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." The words, "who is a resident of this State," were not originally in the act; they were inserted in 1845. Prior to that time, if the defendant was not a resident of the State when the cause of action accrued, the statute did not begin to run until he became a resident of the State. [King v. Lane, 7 Mo. 241; Tagart v. Indiana, 15 Mo. 209.] But since the insertion of those words, it has been held that the statute began to run when the cause of action accrued, although the defendant was a nonresident. [Thomas v.

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Black, 22 Mo. 330; Scroggs v. Daugherty, 53 Mo. 497; Fike v. Clark, 55 Mo. 105; Orr v. Wilmarth, 95 Mo. 212.] We are not advised as to any exceptions to the running of the statutes in Kansas, and must therefore assume the law there is like ours. [Davis v. McCall, 179 Mo. App. 198, 203.] Therefore we must hold that notwithstanding defendant was not a resident of Kansas when plaintiff's cause of action accrued against it, and is not now, yet the three-year statute of that State began to run when the cause, or causes, of action accrued, thus barring any action in that State on any claim which had accrued more than three years before this action was begun.

Now, as above stated, we have had since the revision of 1899, a statute (Sec. 1895, R. S. 1909) which reads as follows: "Whenever a cause of action has been fully barred by the laws of the State, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this State."

There can be no mistaking the meaning of that statute and its application to this case. But for such statute the period of limitation in this State (being a matter of remedy) would govern. But the claims older than three years, being plainly barred if the action had been brought in Kansas, must be held to be barred when the action is brought in this State. [Handlin v. Burchett, 270 Mo. 114; McCoy v. Railroad, 134 Mo. App. 622; Deal v. Railroad, 176 Mo. 8; Bemis v. Stanley, 93, Ill. 230; Lloyd v. Perry, 32 Iowa, 144.]

In the first of those cases Judge GRAVES in delivering the unanimous opinion of the Supreme Court said: "The cause of action having originated in the State of Iowa, if it was barred in that State, when instituted in this State, there can be no recovery by the plaintiff. Our statute, section 1895, Revised Statutes 1909, quoted in in the statement of facts, settles this question, and it is not contended otherwise by distinguished counsel for plaintiff. We start our consideration of the case with this question out of the way. Other questions must abide

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the construction of the Iowa laws. This whole matter turns upon the question as to whether or not under the Iowa laws the plaintiff had a live cause of action, and one which could have been enforced in Iowa, at the time he instituted his suit in Missouri. If under the Iowa laws he had lost the right of action, in Iowa, prior to August 12, 1912 (the date of filing his suit in Missouri), he has no right of action here." In the McCoy case the cause of action (personal injury) was barred if it had been brought in Iowa and we held it to be necessarily barred here; and so in the Deal case, we applied our statute to a case originating in Oklahoma.

In the Bemis case the Supreme Court of Illinois said (p. 233) that "By the enactment of section 20, it was doubtless intended to close the doors of our courts to the enforcement of stale claims which could not be enforced in the State where the cause of action arose."

The same was decided in the Lloyd case. There the Iowa statute is similar to ours, except it is made to depend on the fact that the defendant had resided in the foreign State, while ours only requires that the cause of action shall have originated in the foreign State. This difference is of no importance as affecting the application of the decision in this case. The court said of the Iowa statute that there was "no room for construction; the language of the statue is too plain and the law too clearly within it, to admit of any doubt as to its construction." We are cited by plaintiff to Williams v. Railroad, 123 Mo. 573; but that case was determined several years prior to the enactment of our statute in 1899. And, of course, can have no influence on cases arising since. We are also cited to Gross v. Watts, 206 Mo. 373, 396, 398. In that case the statute here involved was not construed or mentioned. So we are cited to Yost v. Railroad, 245 Mo. 219, 236-239. That case involved a common-law action arising in the State of Colorado for personal injuries. There was also a statutory action for the same cause, and there was a Statute of Limitation in that State to the statutory action limiting it to two years. The court held,

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in an opinion by Judge BLAIR, that as the action brought was at common law, the limitation on a statutory action did not apply. It is clear that neither of these cases affect Handlin v. Burchett, 270 Mo. 114, supra.

Plaintiff in its reply pleaded an estoppel against defendant's right to interpose the Statute of Limitations, based on the ground that defendant requested delay in bringing the action until certain suits were determined. That after those suits were decided, defendant requested that no action be brought until it could check up all bills and ascertain if they were correct, and "that at the instance and request of the defendant, the plaintiff delayed its action on said account, and that by reason of the foregoing facts defendant is now estopped to plead that any portion of said account is barred by any Statute of Limitations."

There is no plea that defendant promised not to plead the statute; there is no allegation that defendant agreed to pay the disputed claim if plaintiff would delay beyond the period of limitation; in fact there is no allegation of any facts which would in any way show that either party had the matter of limitation in view. The utmost that can be allowed in plaintiff's favor, to the plea is that defendant put plaintiff off with a request for delay. If this were held to be good the application of the statute would be seriously limited; for such requests are urged by a large proportion of unready debtors.

But the evidence relied upon accounts for the meagre allegations. No promise was shown not to plead the statute, and we think the correspondence between the parties in no way shows that plaintiff was being misled. On the contrary there are reasonable inferences to be drawn therefrom that plaintiff was not relying on any requests from defendant. In Monroe v. Herrington, 110 Mo. App. 509, 518, Judge GOODE, after stating that it had been decided in Bridges v. Stephens, 132 Mo. 524, that a proper verbal agreement not to plead the Statute of Limitations was

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valid, proceeded to discuss the necessary elements of such agreement, in the course of which he said that "mere reliance on the debtor's promise to pay if not sued, affords no ground for cutting him off from the defense when sued;" citing among other cases Andrae v. Redfield, 98 U. S. 255.

The judgment should be reversed and the cause remanded. All concur.

STATE OF MISSOURI, at the relation of BIRDIE TAUBMAN, Relatrix, v. SAMUEL DAVIS et al., Respondents.

Kansas City Court of Appeals, April 29, 1918.

1. **DIVORCE: Domicile: Husband and Wife.** During the period of cohabitation between the husband and wife, the domicile of the husband is regarded as the domicile of the wife, for the purpose of establishing their identity as husband and wife. But the wife may, for the purpose of establishing venue to bring an action for divorce make herself a residence or domicile separate and distinct from that of her husband.

2. ———: ———: ———. To create a domicile or residence for the purpose of bringing an action for divorce two elements are fundamentally and absolutely necessary. These are actual bodily presence in the county or place combined with freely exercised intention of remaining there permanently, or for an indefinite time at least. The term residence means the actual bodily presence of the party, if that presence is coupled with the intention to remain permanently, or for an indefinite time.

3. ———: **Notary Public: Jurisdiction.** A court does not lose its jurisdiction of a petition for divorce by reason of the act of the law partner of plaintiff's attorney in swearing the plaintiff to the petition, in his capacity as a notary public, because there is nothing either in common law or under the statute forbidding such an act to be performed by an attorney of record and hence such an affidavit is not a nullity.

ORIGINAL PROCEEDING IN PROHIBITION.

WRIT MADE PERMANENT.

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Aull & Aull and *Campbell & Ellison* for relatrix.

W. H. Chiles, Lyons & Ristine and *John M. Cleary* for respondents.

TRIMBLE, J.—This is an original proceeding in prohibition brought by relatrix against her husband, Edwin M. Taubman, and Hon. Samuel Davis, as Judge of the circuit court of Lafayette county, to prevent further action in a suit for divorce filed by said Taubman in said Lafayette court, the ground of relatrix' petition being that said Lafayette court is without jurisdiction to try the husband's divorce suit for the reason that at the time the same was filed relatrix had already brought suit for divorce in the circuit court of Adair county and the same was, and is now, therein pending and undisposed of.

After the provisional writ was issued and the respondents had made return and relatrix had filed a reply thereto, the respondents filed a motion for judgment on the pleadings quashing the preliminary writ and dismissing the petition. This motion was heard and disposed of by the court in an opinion by JOHNSON, J., November 27, 1916, wherein the motion was overruled. [See, State ex rel. Taubman v. Davis, 190 S. W. 964.] No order making the provisional writ permanent was entered, however, and thereafter, upon respondents' application for the appointment of a commission to take testimony, Hon. Nathaniel M. Shelton was appointed with directions to take testimony and report. This has been done and the case has again been argued and submitted upon the question of whether relatrix is entitled to have the provisional writ made permanent. There may be some question whether the presentation of the aforesaid motion for judgment on the pleadings did not operate as a withdrawal of the return, a confession of the facts stated in relatrix' petition, and a supersession of the application for the appointment of a commissioner, so as to make the award of the

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permanent writ a necessary incident to the judgment overruling the motion. [State ex rel. v. Barnett, 245 Mo. 99, 114; State ex inf. v. Vallins, 140 Mo. 524.] It would seem from the authorities just cited that, had the motion been a demurrer, such would certainly have been the proper course. But a motion for judgment on the pleadings is not a demurrer although partaking of some of its qualities. [Hodson v. McArnerney, 192 S. W. 423.] And as respondents were allowed to file their motion and have it considered and disposed of without any intimation that a disposal of same would result in the final disposition of the case, and since relatrix already had a motion for the appointment of a commissioner, this court, having overruled said motion for judgment on the pleadings, thereafter, upon respondents' application, appointed a commissioner and allowed the case to proceed to a hearing on the merits. And since all parties seem to have sought for, appeared and participated in said hearing, and as we are able, after conceding to respondents a hearing on the merits, to reach a conclusion which, in result, is the same as if the provisional writ had been made permanent following the overruling of the motion for judgment on the pleadings, we need not now decide whether or not a judgment awarding the permanent writ should have followed the overruling of said motion, and, therefore, pass that question.

With one exception, possibly two, the facts involved in this litigation are undisputed and are set forth in Judge JOHNSON'S opinion herein above cited. It is, therefore, unnecessary to repeat them here. And at this point it may be well to say that many of the contentions now urged by respondents were considered at that hearing and determined in that opinion, and, consequently we will not enter into a consideration of them again.

The one question of fact (or possibly two), now in dispute between the parties, and to settle which a commissioner was desired to take testimony, has reference to the residence of relatrix at the time she brought

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her suit in Adair county. Had she obtained a residence there, within the meaning of section 2371, Revised Statutes 1909, at the time she brought her suit, or did her residence, fixed by that of her husband, remain in Lafayette county? Did she have cause for separation from her husband so as to entitle her to create for herself a residence separate from his? This last question, it would seem, is, if anything, but a subdivision or branch of the other question.

As barring upon the question of relatrix' residence at the time she brought her suit, the evidence taken before the commissioner shows:

That prior to her marriage, relatrix had for thirty-one years resided with her parents at Kirksville in Adair county, but for awhile just before her marriage she had been employed in Fulton, Missouri, as Matron of the State School for the Deaf. During this time, however, she, at all times and up to her marriage with Mr. Taubman, regarded Kirksville as her home and place of residence. That upon her marriage to Mr. Taubman she went with him to Lexington, Layfayette county, Missouri, and resided there until December 17, 1915, a little over three years. That she left Mr. Taubman's house between nine and ten o'clock at night December 15, 1915, and went to the home of a neighbor lady and staid there till the morning of December 17, 1915, when she left Lafayette county and returned to Kirksville in Adair county. That on the occasion of her leaving her husband's house at the above-named hour of night she was in her room with the door locked and her husband was over the transom endeavoring to get in. That about two weeks before she left Mr. Taubman's house she had made up her mind to go to and make Kirksville her home and residence, and during this two weeks, although under the same roof with Mr. Taubman, they were not living together as man and wife; That when she left Lexington she did so with the fixed intention never to return but to make Kirksville her home and her place of residence; that ever since her return to Kirksville she has continued

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to reside there and make it her home, having sought and obtained employment there as Deputy Recorder of Deeds. That when she left Lexington for Kirksville she took none of her personal effects except the clothes she had on and a small hand bag; that she took no other articles because she was afraid to return to her husband's house for them, but that, through her attorneys, she later succeeded in having her clothing sent to her at Kirksville. That after reaching Kirksville with the intention of remaining there permanently and making it her home, she consulted her attorneys and brought her suit for divorce.

It is true that, flowing from the legal theory of an identity of person in husband and wife, the law regards the domicile of the husband as the domicile of the wife during the period of cohabitation. But under the later and more liberal view, a wife may, for the purpose of establishing venue wherein to bring an action for divorce, make for herself a residence or domicile separate and distinct from that of her husband. [14 Cyc. 847; Wyrick v. Wyrick, 162 Mo. App. 723,735] And in those cases where the *express object of the proceedings* is to establish the fact that the *marital relation ought to be dissolved*, the law recognizes the wife as having a separate existence, separate interests and separate rights. [2 Bishop on Marriage, Divorce and Separation, section 120.] And, therefore, the maxim, that the domicile of the wife follows that of the husband, will not be applied so as to prevent a wife obtaining a domicile elsewhere for the purpose of bringing a divorce action, or to oust the court of jurisdiction when she has done so. [Harteau v. Harteau, 14 Pick (Mass.), 181.] For the purposes of divorce actions, the law permits separate domiciles and the maxim has no force and cannot prevail in a divorce case. [2 Bishop, sec. 112.] By necessary interpretation the statute, giving the wife right to sue for divorce, includes all needful collateral rights among which is the right to have a separate domicile. [2 Bishop, sec. 116.] In proceedings which from their very nature makes a husband and

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wife opposite parties, the legal fiction of the unity of person created by the marriage will not be followed to destroy the rights of either contrary to the principles of natural justice. [Colvin v. Reed, 55 Pa. St. 375.] Nor is it necessary, in order to confer jurisdiction on the court in which the wife's suit is brought, that her right to a divorce must be established *beforehand*. The purpose of the divorce suit is to establish that, and to require her to establish the fact that she is in the right before she can bring her suit or, which is the same thing, before she can create a domicile and secure a venue in which to bring it, is to demand that she shall establish the justice of her case before she will be allowed to sue for that purpose. Hence, in deciding the proceeding now before us, we do not have to prejudge or decide the divorce case and *finally* determine that relatrix was justified in leaving her husband and instituting suit for divorce in order to settle the question whether she could acquire a separate domicile in Adair county so as to confer jurisdiction upon the circuit court there to hear and determine her suit. The cause of action for divorce is founded upon the "*allegation* of a *delictum* which legally justified a living apart, and took away the husband's right to fix the domicile of the wife." [2 Bishop, sec. 112.] But if it be necessary that at least *some showing* be made herein, we may observe that the petition, verified by the affidavit of the plaintiff (relatrix here), setting out the causes and grounds for divorce and the residence of plaintiff, was introduced without objection before the commisioner, and contains all the *allegations* necessary to confer jurisdiction. In addition to this, she may be granted the benefit of whatever prima-facie showing may arise by way of inference from the facts, shown before the commissioner, that she left her husband's home *in the nighttime* without securing her clothing, and was *afraid* to go back after it. A further showing of the circumstances under which she left was prevented by an objection on the part of the husband that this was going into the merits of the case. We are, therefore, of the

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opinion that nothing has been made to appear herein which, in law, forbade or prevented Mrs. Taubman from creating a separate domicile in Adair county which would confer upon the circuit court of that county the jurisdiction or power to entertain and hear her petition for divorce. The only question remaining is had she, at the time her divorce suit was filed, acquired a residence in that county within the meaning of section 2371?

In determining whether a person has created a domicile or "residence" in a place, we are apt to confuse the fact itself with the things that are usually considered as *evidences* of the fact in question. For instance, when we say a person has his "residence" in the county, the word connotes many things in ordinary meaning—a house, an accustomed place to stay, a business, etc. But "residence" in the legal meaning, and as here used, does not necessarily require these things though very frequently they are looked at to determine the ultimate fact to be proved. To create a "domicile" or "residence" as here used, only two elements are fundamentally and absolutely necessary or essential. These are *actual bodily presence* in the county or place combined with the freely exercised *intention of remaining there* permanently, or for an indefinite time at least. Whenever these two elements combine, a domicile of choice is created and all former domiciles are *ipso facto* abandoned. [Minor on Conflict of Laws, 114; Dicey on Conflict of Laws, 104.] "Every person of full age having a right to change his domicile . . . if he removes to another place with an intention to make it his permanent residence (*animo manendi*), it becomes instantaneously his place of domicile." [Story on Conflict of Laws, 50.] "Neither presence alone nor intention alone will suffice to create a domicile of choice. Both must concur and at the very moment they do concur, the domicile is created." "The term 'residence' as here used means simply the actual *bodily presence* of the party, if that presence is coupled with the intention to remain permanently." [Minor on Conflict of Laws, 115.] It is not necessary that the intention should be to remain

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one's whole life; what is meant by "permanently" here is that there must be a fixed and definite purpose to remain "for an unlimited or indefinite time, without any definite intention of ultimate removal." [Minor, p. 117.] The same author at page 116 says: "Since physical presence (coupled with the *animus manendi*) is all that is required, it is immaterial to inquire whether the party is living in a house of his own, in a rented house, in a hotel, in lodgings, or has no place to lay his head. These may be, and often are, of the greatest importance as evidence whereby to determine whether he has the proper *animus;* but if that is established otherwise they become unimportant." . . . "At the moment when a party, being present in a place, forms the definite intention to remain there permanently, from that moment a domicile of choice is created, which will in general continue until a new domicile is acquired." That the above and foregoing principles, stated by the text books cited, are abuntantly sustained by the decisions, is shown by an examination of the following authorities: Ringgold v. Barley, 5 Md. 186; Mitchell v. United States, 21 Wall 350; Allgood v. Williams, 92 Ala. 551; Price v. Price, 156 Pa. St. 617; White v. Tenant, 31 W. Va. 790; Lowrey v. Bradley, 1 Spier's Eq. (S. C.) 1, 39 Am. Dce. 142 Dupuy v. Wurtz, 53 N. Y. 556; City of Hartford v. Champion, 58 Conn. 268; Guier v. O'Daniel, 1 Binn (Tenn) 349, note; Sumrall's Committee v. Commonwealth, 172 S. W. (Ky.) 1057; Hart v. Lindsay, 17 N. H. 236.] In Hill, v. Hill, 166 Ill. 54, it was held that where a wife had resided in the State for the required length of time, but moved to another county just prior to bringing suit, her legal residence there for jurisdictional purposes depended upon her good faith in going and her intention to reside there permanently and not upon the length of time she has resided in her new home.

It is manifest from the above authorities and from a consideration of all the evidence taken before the commissioner (so earnestly asked for by respondent Taubman upon the announcement of the former opinion), that not only does it appear that relatrix created a domicile

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of choice in Adair county so as to confer jurisdiction on the circuit court of that county to hear and determine her cause of action for divorce, but also that no cloud has been cast upon her motives in so doing. The hearing before the commissioner, therefore (even though the appointment of one may not have been according to the usual procedure in this class of cases, but was made because both sides seemed to desire it), has not developed anything beyond what was considered in the former opinion to prevent the provisional writ being made permanent.

Point is now made that the Adair court acquired no jurisdiction because the notary public before whom relatrix swore to her petition for divorce was the law partner of the attorney who prepared it for her. There is nothing either in the common law or in the statute forbidding such an act to be performed by an attorney of record, and hence the affidavit is not a nullity. [Smith v. Ponath, 17 Mo. App. 262; State v. Noland, 111 Mo. 473, 505.] In Kuhland v. Sedgwick, 17 Cal. 123, it was held that plaintiff's attorney, being a notary public, could take plaintiff's affidavit verifying the complaint. [See, also, Reaves v. Cowell, 56 Cal. 588, 591; Young v. Young, 18 Minn. 90; 1 R. C. L. 763-4.] There being nothing in the common law forbidding this, it is, therefore, "generally held that, in the absence of any statute or rule of court to the contrary, an affidavit is not defective because taken by an attorney in the cause." [2 Cyc. 12.] [See, also, Hueston v. Preferred Accident Ins. Co., 143 N. W. 566; Hankins v. Helms, 12 Arizona, 178; McDonald v. Willis, 143 Mass. 452; Swearingen v. Howser, 37 Kans. 126; Horkey v. Kendall, 53 Neb. 522.]

This disposes of all questions raised which were not decided by the former opinion. It follows, therefore, that, if said opinion is to stand, the provisional writ should be made permanent, and it is so ordered. The other judges concur.

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RAY CRANE, Respondent, v. KANSAS CITY SOUTHERN RAILWAY COMPANY, et al., Appellants.

Kansas City Court of Appeals, April 29, 1918.

1. **PERSONAL INJURY: Plaintiff's Inexperience: Pleading.** In a personal injury case it is error to allow plaintiff to prove his inexperience unless it was pleaded and proven that the defendant knew he was.

2. **EVIDENCE: Control of One Party: Presumption: Exception.** The rule that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted," does not apply against a party not calling a witness where such witness is equally accessible, or under the control of the other party.

3. **RAILROAD CROSSING: Material: Character of Crossing: Duty.** In constructing a railroad crossing it is required by statute to be made of gravel, macadam or planks, and that the plank outside each rail, shall be approached by gravel or macadam six inches deep substantially and properly joined up to the plank. It is also required that the crossing shall be "good and sufficient." So where a crossing is defectively made of gravel inside the rails, if the plank would have made it good and sufficient the railway company would be negligent in not using plank. And so if gravel and macadam on the outside of the rails could not be joined up to the outside planks without the use of cement, it would be the duty of the company to use cement, though it is not mentioned in the statute.

Appeal from Jackson Circuit Court.—*Hon. William O. Thomas*, Judge.

REVERSED AND REMANDED.

Reed & Harvey, Cyrus Crane and *Hugh Martin* for appellants.

E. H. Gamble for respondent.

ELLISON, P. J.—Plaintiff's action is for personal injury received by falling from a wagon drawn by two mules.

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He instituted his action against three defendants, viz; Kansas City Southern Railway Company. The St. Louis and San Francisco Railroad Company and the Davidson Construction Company and recovered judgment against all three in a lump sum. The railroad companies are lessor and lessee.

The construction company had plaintiff in its employ and directed him to haul a load on the wagon over a road that led down a hill and across the Southern railroad at a public crossing not quite at the bottom of the hill, to a point beyond. The wagon was equipped with the usual sized "bed," across the bed was a hay rack extending over its sides and on this some flat sheet iron was laid and on top of these, towards the front, there was a metal chicken house and some fence posts had been pushed into it. There was no brake on the wagon and the hill was long and somewhat steep. Two mules were hitched to the wagon and plaintiff sitting in front on the edge of the hay rack and his feet on the doubletrees, started as directed. In going down the hill, there being no brake on the wagon, the mules could not be held back properly and in consequence approached the crossing at too rapid a gate for a wagon loaded as this one was. The wagon struck the crossing, got over and several feet on the other side, when plaintiff fell, or was thrown therefrom to the ground, ran over and severely injured.

The crossing was not such as is required by the statute (Sec. 1, Laws 1915, p. 696; Sec. 10626, R. S. 1909). It had been provided with boards on each side of each rail and gravel placed between, but the boards had become worn down and one was partly split off. So the gravel and earth adjoining and on the outside of the rail which plaintiff approached and first struck with the wagon, had been allowed to wear away leaving the rail itself higher above the surface than was safe. Without going into detail it is enough to say, that the rapidly moving wagon, without a brake, and it cumbersome, unsecured load, together with the rough and improper

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crossing, caused plaintiff to be thrown, or to fall to the ground.

The acts of negligence alleged in the petition against the construction company are separate, viz., improper bits on the bridles, unbroken mules, failure to secure the load on the wagon and absence of a brake. Plaintiff does not necessarily need to prove all of these; either, if a proximate cause will suffice. There was no evidence as to the bridle bits being unfit, or that the mules were wild and so the court instructed; but there was evidence tending to prove the allegation as to the insecurity of the load and that there was no brake on the wagon, and this fully justified the court in refusing the peremptory instruction offered by the construction company.

There were, however, errors in the course of the trial materially affecting the merits of the case under the issues. Plaintiff was allowed to introduce evidence that he was inexperienced in the service in which he was engaged, when there was no allegation in the petition that the construction company knew it, nor was there any proof that it knew it. [Batesill v. Smelting Co., 190 Mo. App. 231, 239; Fulwider v. Gas Co., 216 Mo. 528, 597.] This was harmful to all of the defendants.

Plaintiff was also allowed to prove that he had been examined as to his injuries by a doctor suggested by one of the Construction Company's attorneys, this doctor was not called as a witness by either party, but plaintiff had introduced another doctor who testified as to his injuries, and his object in showing the examination by the doctor suggested by defendant's attorney was that the jury might be advised that the testimony of plaintiff's doctor must be true, else defendant would have contradicted it, if he could, by the other doctor. There is a rule that, "All evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." [Kirk v. Middlebrook, 216 Mo. 245, 288; Powell v. Railroad, 255 Mo. 420, 447.] But that rule finds application in instances where the party failing to call a witness, or to produce matters of evidence,

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has the advantage of the other by having the witness, or matter of evidence, within easier control. [Bank v. Worthington, 145 Mo. 91, 103; Kersher v. Vorweg, 130 Mo. 196, 201; Bent v. Lewis, 88 Mo. 462, 470.] In these cases it is said that "Ordinarily the circumstance that a particular person who is equally within the control of both parties is not called as a witness, lays no ground for any presumption against either." This was harmful to all the defendants.

Defendants the Southern Railroad Company had a station agent at a village near a half mile from the crossing. It seems that he had made a written unsworn statement as to the circumstances attending plaintiff's passage over the crossing. It was offered and admitted while he was testifying, as a witness, not as matter of impeachment, but as substantive proof of the matters it contained. This evidence was brought out by the St. Louis and San Francisco Railway Company, but it was objected to by the Construction Company and was error as to it.

As the case is to be retried we will state our view as to the duty of the railways in the matter of the construction of the crossing. It is alleged in the petition and it was shown that the railroad having been built on descending ground, or side hill, the crossing could not be properly constructed, that is, made "good and sufficient" as required by the statute, if made of macadam or gravel, "without binding the gravel or macadam with cement. or other binding material, or the employment of some other adequate means to keep it in position." The railway company insists that plaintiff, by these allegations, has shown himself to be without a case. Their instance is based on the statement that they were not required to cement the gravel or macadam. The requirement of the statute is that a railroad company must "maintain good and sufficient crossings, . . . to be constructed of material and in the manner following: On each side of each rail shall be laid and evenly spiked to the cross ties a plank of good sound timber of not less than ten inches in width and three inches in

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thickness, . . . The space between the inside planks shall be filled with macadam or gravel or two inch boards evenly with the top of the planks, and shall make good and sufficient approaches thereto of equal width and of easy grade; the same shall be covered with macadam or gravel to a depth of not less than six inches and shall be subtantially and properly joined up to the plank required to be laid on outside of each rail." It will be noticed that the material to be used between the planks inside and next to the rails is gravel or macadam, "or two-inch boards;" and that the six-inch macadam or gravel for approaches to the rails "shall be substantially and properly joined up to the plank required to be laid on the outside of each rail."

Therefore, when the company chooses lose macadam or gravel, and it is seen that, for any reason it will not make "a good and sufficient crossing" at any particular place, the company should bind, or otherwise solidify it, or else it should use boards, the other material permitted by the statute. The idea being, that if out of the material prescribed by the statute a good and sufficient crossing can reasonably be made it should be done. And so of the approaches to the crossing, it is required, not only that they shall be of macadam or gravel, but that such material "shall be properly joined up to the plank." If this joining cannot be kept securely and reasonably in place in one way and could be by some other, even though it required the use of cement, or other mode which could reasonably be adopted, it should be done.

These observations show that the trial court rightly refused the demurrer of the railway company's.

It was not necessary that plaintiff should prove each act of negligence charged in his petition, nor do we think, as claimed by defendants that the charges of negligence constitute one inseparable chain with a necessity to prove each link. Other matters have been discussed which may not arise again.

The judgment is reversed and cause remanded. All concur.

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IRA W. LAYSON, Appellant, v. JOHN H. RILEY, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **HOMESTEAD: Incumbrance: Payment: Creditor.** A man resided on his homestead upon which there was an incumbrance for $480. He made a voluntary conveyance of the homestead to his daughter, subject to this incumbrance, and then, with independent means, paid off the incumbrance. She then conveyed back to him. A judgment creditor for $100 sought, by bill in equity, to charge this judgment as a lien on the homestead. It was *held* he could not do so.

2. **EQUITY OF REDEMPTION: Payment: Creditor: Equity.** One may have a homestead in an equity of redemption, and if he pays the mortgage, he still may hold the homestead, thus relieved of the incumbrance, and creditors have no right to follow the sum paid in discharge of the incumbrance, into the land.

3. **DEBTOR: Protection: Incumbrance: Creditor.** The debtor may protect his homestead by paying an incumbrance so long as he does not increase it beyond the limited value, without giving a creditor a right to follow the sum paid and apply it on his claim.

4. **FRAUD: Creditor.** The fraudulent conveyance of a homestead affords no right to creditors to attack it, since they have no claim on such homestead and in consequence, cannot be defrauded by its conveyance.

Appeal from Buchanan Circuit Court.—*Hon. Thomas B. Allen*, Judge.

AFFIRMED.

Duvall & Boyd for appellant.

Charles F. Keller for respondents.

ELLISON, P. J.—This is an action in equity to subject a certain lot in St. Joseph, Missouri, to the lien of the judgment plaintiff had against defendant Riley. The defendant Mary is the daughter of Riley. The defendant prevailed in the trial court.

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A judgment for $100, was rendered in plaintiff's favor against Riley by a justice of the peace, on the 14th of May, 1915. A few days prior to this judgment Riley, without consideration, conveyed the property to his daughter, subject to a deed of trust for $480, which was afterwards paid by Riley. The daughter afterwards conveyed the property back to Riley. It is conceded by plaintiff that prior to Riley's conveyance the property was his homestead, but plaintiff says that when "he conveyed it he could never claim a homestead in it again so for as plaintiff's judgment was concerned." Plaintiff further insists that when Riley "conveyed the property to his daughter subject to the deed of trust, he conveyed to her merely the equity of redemption and the land became the primary fund for the payment of the incumbrance;" and that Riley was relieved from the duty of paying the incumbrance; and that when he paid it, his act was voluntary and a fraud upon plaintiff; and that, therefore plaintiff may follow the fund into real property and have his judgment satisfied out of that property.

We find ourselves not able to understand how plaintiff's theory of his case can be allowed to affect the fact that the property was Riley's homestead and in no way subject to the payment of plaintiff's judgment.

Under the rule in this State the property, notwithstanding Riley may have fraudulently conveyed it to his daughter and afterwards received a deed back from her, was all the time his homestead. His fraud (if any) in respect to the homestead could not affect his right to claim that it was exempt from plaintiff's judgment. [Vogler v. Montgomery, 54 Mo. 577, 584; Seilert v. McAnally, 223 Mo. 505, 516; Guinan v. Donnell, 201 Mo. 73, 212.]

Nor does the fact that defendant Riley paid off the incumbrance of $480 affect his homestead right. It was his privilege, without interference from plaintiff, to protect his homestead, so long, of course, as he did not increase its value over the homestead right as limited by the statute.

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Plaintiff, looking to the fact that Riley had a homestead in land incumbered by a mortgage and that he conveyed the homestead to his daughter and then paid off the mortgage, with independent means, claims that he, plaintiff, has a right to hold the homestead up to the amount so paid in discharge of the mortgage. He relies on the law as stated in Vandervort v. Fouse, 52 West Va. 214; that if a father put valuable improvements upon land of his daughter, their value may be charged on the land by his then existing creditor, regardless of whether the father was attempting a fraud. And also as stated in Peoples Nat. Bank v. Loeffert, 184 Pa. St. 164, that where a debtor conspiring with another to defraud his creditors, furnishes material to make improvements on the other's land, a court of equity will award a lien on the land in favor of the creditors to the extent of the costs of the improvements.

We think that branch of the law not applicable to the facts in the present case. Here, as we have endeavored to show, defendant Riley had a homestead in the property and the act which plaintiff attacks was an act in preserving such homestead by paying the incumbrance. When he did so, it yet remained his homestead relieved of the incumbrance, and also unaffected by any claim of creditors, so long as the homestead was not increased beyond the limited value.

In Cheatam v. Jones, 68 N. C. 153, the court said that "A mortgage is a mere incumbrance upon a man's land, and given as security for the debts therein set out; and if he can discharge the incumbrance by the sale of the land *outside of his homestead, or in any other way,* creditors who are not secured by the mortgage have no ground upon which to deprive him of the homestead secured by the Constitution." This view of the law is also stated in Waples on Homesteads, 119, and by Thompson on Homesteads, sec. 170. The same things is decided in Butler v. Steinback, 87 N. C. 216, 219.

In Fellows v. Dow, 58 N. H. 21, the court said that "The right to redeem a homestead from a mortgage . . . is an interest of the debtor in the homestead,

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and an interest in which the statute gives a homestead right."

In Smith v. Lackor, 23 Minn. 454, an attempt was made by one who had furnished lumber for a house erected on the homestead, to treat his claim as though it were a part of the purchase money which could be enforced against a homestead. But the court said: "It is no more a part of the purchase money (of the real estate) than the price of a fruit tree or a fence post, used for the improvement of the property, would be."

So in any view which may be taken, the ruling of the trial court was correct; and the judgment will be affirmed. All concur.

LYNNE R. LITTLEFIELD, Appellant, v. EDWIN C. LITTLEFIELD, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **JUDGMENT OF DIVORCE: Fraud: Action to Set Aside: Remarriage.** Husband and wife were divorced for her fault, after personal service on her. More than three years afterwards she brought a bill in equity to set aside the divorce and adjudge her support and maintenance, on the ground that the husband had wrongfully induced and influenced her to confess to adultery and consent to a divorce; and that after the divorce he continued martial relations with her. Before she brought her action the husband had remarried. After she brought it and after her appeal and submission of the cause to the appellate court, but before a decision, she married. It was *held* that by marrying she adopted the divorce and waived the fraud and abandoned that part of her action.

2. **MAINTENANCE: Divorce: Fraud: Waiver.** Where husband and wife are divorced for her fault and she brings a bill in equity to set aside the divorce for fraud and for support and maintenance, and before a final decision of such case marries, she thereby waives the fraud and adopts the divorce; and such divorce, for her fault, leaves her without right to maintenance, or support.

Appeal from Johnson Circuit Court.—*Hon. A. A. Whitsett,* Judge.

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AFFIRMED.

Geo. W. Barnett and *C. C. Kelly* for appellant.

N. M. Bradley and *J. W. Suddath & Son* for respondent.

ELLISON, P. J.—Defendant and plaintiff were formerly husband and wife. They were divorced on his petition, for her fault, after personal service was had. More than three years afterwards she began the present action by filing her bill in equity to set aside the divorce on charges of fraud, viz., that he wrongfully influenced her to make confession of adultery and to consent to a divorce, he, all the while, living with her as his wife, and continuing marital relations with her after the decree of divorce was granted. There was included in the prayer of her bill a demand that she be granted "an adequate amount of damages, alimony, support, maintenance, counsel fees, expenses and such other relief," as was proper. The trial court dismissed the bill and she has brought the case here for relief.

After the divorce was granted to him, he again married; and since the trial of this cause, and while her appeal was pending, and after the cause had been submitted to this court, she also married.

It has been ruled that a judgment for divorce, on a fictitious cause, may be set aside in a court of equity for a fraud practiced on the court as to jurisdiction of the person of the defendant. [Dorrance v. Dorrance, 242 Mo. 625 (overruling Salisbury v. Salisbury, 92 Mo. 683.] Whether that case would ordinarily have been applicable to this, we need not say. But we are of the opinion that when plaintiff married, she waived the fraud, accepted the divorce and abandoned that part of the present action. The judgment for divorce in favor of defendant now stands unaffected by the charges of fraud in its rendition.

But plaintiff insists that though she be denied that part of her bill wherein she seeks to annul the divorce,

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she should be granted that part wherein she asks damages adequate to relieve and maintain her. This is put upon the ground that, though, as a matter of public policy, a divorce should not be annulled, even when obtained by fraud, yet a separate action may be maintained for the defrauded wife's property rights. This view is sustained in Bay v. Bay, 85 Ohio St. 417. For a greater reason such relief would be granted in those jurisdictions where the divorce itself may be set aside for fraud. [Clay v. Robertson, 30 Okla. 758.] But the difficulty with plaintiff's case is the *status* she fixed for herself in recognizing the validity of the divorce by remarrying. By that act the divorce, in effect, was advanced to the plane of judicial propriety on good grounds, without fraud. The divorce must therefore be considered as ending all claim plaintiff may have had on defendant's property by reason of formerly having been his wife. [Donaldson v. Donaldson, 249 Mo. 228, 242-245.] We think In re Herman J. Christiansen, 17 Utah, 412, not applicable.

The judgment is affirmed. All concur.

SARAH M. DICKINSON, Appellant, v. W. H. Vail, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **NEGOTIABLE INSTRUMENT STATUS: Renunciation: Consideration.** It is provided in the Negotiable Instrument Statute (Sec. 10092, R. S. 1909) that the holder of a note may renounce his rights against any party to the instrument. It was *held* that to renounce did not necessarily mean without consideration, and that though a written renunciation was given upon a consideration, it was valid.

2. **RENUNCIATION: Part of Note.** Under section 10092, R. S. 1909, of the Negotiable Instrument Statute the holder may renounce a part of the note.

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3. ———: **Absolute and Unconditional: Conditional.** If an "absolute and unconditional" renunciation is made by the holder to the principal debtor it releases all parties to the instrument. But this would not prevent the holder from making a conditional renunciation to any of the parties including the principal debtor.

Appeal from Bates Circuit Court.—*Hon C. A. Calvird,* Judge.

AFFIRMED.

Silvers & Dawson for appellant.

Templeton & Hales for respondent.

ELLISON, P. J.—Plaintiff's action was instituted to recover an alleged balance due on a promissory note. The judgment in the trial court was for defendant.

A promissory note was given to plaintiff for four hundred dollars, signed by J. W. Trimble, Nora Trimble, J. G. Rennie, W. M. Bennington and W. H. Vail. The action was dismissed as to all except defendant Vail. On the face of the note all these parties appear to be makers, but in fact, the three named last were sureties for the two named first. After the note became due plaintiff and defendant Vail entered into the following written contract: "This indenture, made and entered into this 31st day of December, 1915, by and between Sarah M. Dickinson, party of the first part, and W. H. Vail, party of the second part, Witnesseth:—That, Whereas, on the 1st day of January, 1913, W. H. Vail, J. G. Rennie, and W. M. Bennington, signed as securities a certain promissory note payable to Sarah M. Dickinson, and made by J. W. Trimble and Nora Trimble, his wife; and whereas, the said note is past due and unpaid; and whereas, demand has been made on the said J. W. Trimble for payment, and he has refused to pay the said note; Now, Therefore, in consideration of the payment of the sum of two hundred and sixteen dollars ($216) by W. H. Vail to the said Sarah M. Dickinson, the receipt whereof is hereby acknowledged, the said Sarah M. Dickinson,

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has released, and by these presents does release, the said W. H. Vail from any and all further liability on the said above-described note:—Provided, That if the said party of the first part file suit against the above-named J. G. Rennie, obtain judgment, and levy execution on the goods and chattels of the said J. G. Rennie and be unable to recover the balance due on the said above-described note, then the said party of the second part agrees to pay the said balance on the said note; otherwise he is forever released as above set forth."

In compliance with this agreement plaintiff brought suit against Rennie before a justice of the peace, but judgment was rendered against her by the justice on the ground that plaintiff had extended the time of payment without Rennie's consent. She appealed to the circuit court, but negligently failed to give notice of the appeal and it was dismissed, and thus Rennie became finally discharged from obligation on the note.

Plaintiff insists that since the payment made by defendant was a payment he owed to her and was in duty bound to make, it was not a consideration for her agreement to release him from the obligation to pay the balance. Defendant's position is that a consideration was not necessary and he relies on section 10092, Revised Statutes 1909, of our Negotiable Instrument Law. That section reads as follows: "The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." Plaintiff insists that that section only refers to and includes releases which were made without consideration. Plaintiff's idea seeming to be that the word "renunciation" used in the statute was not a bargain, but a renouncing in the sense of refusal to have further to do with the thing renounced. We think that not a proper con-

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struction of the statute and that it may be made for a consideration. [Whitcomb v. National Bank, 123 Md. 612.]

Neither do we agree with plaintiff that the statute will not apply unless the *whole* note is renounced or released. If one may effectually renounce the entire claim without consideration, there would seem to be no reason why he may not also be bound by a renunciation of a part of it.

In this connection we note the particular objection made by plaintiff to the written agreement above quoted. She insists that to be at all effective under the negotiable instrument statute, the renunciation must be "absolute and unconditional." The words just quoted are only a part of that section. The first sentence authorizes the holder of the note to renounce his rights against *any* party to the instrument; while the second sentence refers alone to the *principal* debtor, and makes "an absolute and unconditional renunciation" as to him a discharge of the instrument. But this does not hinder such holder from conditionally releasing any of the parties to the note, including the principal debtor. The statute merely affirms the effect of an absolute and unconditional renunciation to the principal debtor, but it does not prevent a renunciation that is not absolute and unconditional.

The judgment is affirmed. All concur.

J. M. NANCE, Appellant, v. A. W. SEXTON, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **VENDOR: Executory Contract: Ownership of Land: Knowledge of Buyer.** One cannot make a valid executory contract for the sale of land which he does not own and in which he has no interest, unless the buyer knows he does not.

2. **VENDOR'S LACK OF TITLE: Purchaser: Rescission: Damages.** If the vendor in an executory contract for the sale of land has

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no title, nor no interest in it, but the purchaser believes he had the latter, on learning that he has not, may repudiate the contract and will not be liable for damages to the seller.

3. **VENDOR'S INTEREST: Fraud: Rescission.** If the vendor in an executory contract for the sale of land knowingly deceives a purchaser into the belief that he is the owner of the land, when in fact, he has no interest in it, and the purchaser would not have entered into the contract if he had known the fact, the vendor is guilty of a fraud and the purchaser may repudiate the contract on learning of the deception.

Appeal from Macon Circuit Court.—*Hon. Vernon L. Drain,* Judge.

AFFIRMED.

Sheppard & Sheppard for appellant.

Nat M. Shelton and *C. C. Buster* for respondent.

ELLISON, P. J.—Plaintiff's action is for damages alleged to have accrued to him by reason of defendant having repudiated a sale and exchange of farms and refused to carry out the contract. The trial court sustained a demurrer to the evidence and judgment was rendered for defendant.

It appears that plaintiff was a real estate agent residing in Stoddard county in southeast Missouri and that defendant was a farmer residing in Macon county, in the northeast part of the same State. Plaintiff frequently went about the State in pursuit of his business. He met defendant in Macon City the county seat of Macon county and proposed to trade him a farm in Stoddard county for plaintiff's farm. This meeting in Macon City was without prearrangement and defendant did not know that plaintiff was a real estate agent. The only understanding which can be had of the record is that plaintiff's proposal was to exchange his own farm for defendant's, the difference in value and acreage and encumbrances to be adjusted. Plaintiff went out with defendant to look at the latter's farm. They returned to Macon

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City and went down together to Stoddard county that defendant might look over that farm. Plaintiff took defendant over it and the latter was pleased. A written contract of exchange was drawn between them and signed by each, in which plaintiff is stated to be the owner of the Stoddard farm, in words such as: "Each party thereto;" and "Each are conveying" and "Their said described land;" and "Each party is to give possession of their tracts of land," etc.

Defendant returned home. In the course of several days plaintiff, who had been in Illinois, came back by way of Macon City, when he was informed by defendant that his wife refused to make the exchange and would not sign a deed and that he was afraid he could not carry out the contract. Something transpired in plaintiff's conversation, or conduct, that caused defendant to ask plaintiff if he was the owner of the land he was undertaking to sell. After some evasion, plaintiff admitted he was not. Thereupon defendant immediately repudiated the contract, plaintiff returned home and in a few weeks instituted this action.

Defendant having repudiated and rescinded the contract, left plaintiff free to institute a action for damages without the necessity of tendering a deed in performance of his part of it. [Armstrong v. Dunn, 163 Mo. App. 701.] But the question presented by defendant's act is whether one who is not the owner of land he contracts to sell and is without any claim of title, can make a valid contract of sale? There are decisions by courts of the highest standing, that he may, if at the time of performance he is able to furnish a good title. [Dresel v. Jordan, 104 Mass. 407, 414; Backman v. Park, 157 California, 607; Rutland v. Brister, 53 Miss. 683, 686.]

Other authorities qualify that rule with the statement that the purchaser must have known that the seller was not the owner. [Weitsel v. Seysor, 23 South Dakota, 367, 374; Walkin v. Nokken, 161 N. W. 194. (S. D.).]

Others qualify the rule by the condition that the vendor must have had some claim or right to the land. [Topp v. White, 12 Heiskell 165, 179; Pipkin v. James,

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1 Humphrey (side page) 325, 328; Green v. Chandler, 25 Texas, 148, 159-161; Trust Co. v. McIntosh, 68 Kansas, 452, 462; Drake v. Latham, 50 Ill. 270, 272; McNeny v. Campbell, 81 Neb. 754, 758.]

We are inclined to the qualification last stated and to hold, that if one has no title, nor bona-fide claim of owner-ship, and this is unknown to the proposed purchaser, he cannot make a valid executory contract with such purchaser, and that the latter may repudiate such contract upon learning the fact before executing the contract. It seems to us that a contract of that character lacks mutuality. It is a contract such as that if the true owner of the property conveys it to the purchaser, or to the adventurer, and the latter to the purchaser, all is well; but if the owner refuses and the adventurer is insolvent the deceived party must pocket his loss. And even if the pretended vendor is solvent, the purchaser might want specific performance instead of damages, yet he could not get it, since it would be entirely out of the power of the former to perform. The risk is all with the purchaser; a risk he should not be required to take unless, of course, he knows the fact. It is not a fair answer to this to say, that if the purchaser does not get a title at the time appointed, he may save himself by refusing to pay. He is entitled to a contract that, from the start, binds the other party as effectually as it does himself. To permit the seller to enforce such contract is to allow him to speculate on the chance of his success in getting a title, leaving the purchaser liable to be the victim of what may well be said to resemble a game.

There is another reason why the peremptory instruction was properly given. The authorities last above cited make clear that if the vendor fraudulently conceals the fact that he does not own the land and has no interest in it, he is guilty of a fraud which will justify the purchaser in repudiating the executory contract when he learns the fact. [29 Amer & English Ency. of Law, 667.]

Allowing ordinary common sense to plaintiff he must have known that defendant supposed he was the

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owner of the land he was proposing to sell. They were together several days in Macon and Stoddard counties. They travelled together, yet plaintiff carefully concealed the fact that he did not own the land. The uncontradicted fact is that he never spoke with the owner, and that his only interest in the land was a verbal consent that he might sell it from a firm of real estate agents in Stoddard county whom the owners had verbally authorized to find a buyer. When they went to Stoddard county they were met by one of these agents and he went with them to the farm, not in the capacity of an agent, but as plaintiff's employee and no intimation was given him as to who this agent really was. Finally a contract was drawn with plaintiff as owner. It is perfectly apparent that during this entire time plaintiff was playing the deceptive role and defendant knew no better until some weeks after the contract was signed. It is an uncontradicted fact in the case that defendant would not have entered into the contract with any one but the owners if he had not been misled. Plaintiff testified that defendant did not tell him that he would not, but, assuming he did not tell him, it would not alter the matter; it was not necessary to tell him, for he was engaged the whole time in practicing a deception on defendant which it would not have been necessary to practice if he had not known, or believed, it would have made a difference in defendant's action.

Each party has cited the foregoing case of Armstrong v. Dunn, supra, decided by this court. The questions presented in this case did not arise in that. There the seller was the owner of the farm he contracted to sell and the general and correct rule was stated that the seller must be such an owner that he could convey good title at the time of the contract, or that he would be by the time of performance. There is no intimation in that case that one may practice a fraud, or may pretend to control the sale of a piece of land in which he has no claim or interest, taking the gaming chance of being able to get the title, and if he could, of the contract proving

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profitable. Nor is there anything said in that case countenancing the deception which record shows was practiced here.

The judgment is affirmed. All concur.

LESLIE V. MEDICUS, Respondent, v. T. A. L. ALTMAN, Appellant.

Kansas City Court of Appeals, May 20, 1918.

1. **LEASE: Unrecorded Notice: Possession.** A became the owner of real estate upon which there was an unrecorded lease. He knew the tenant was in possession and accepted rent from him for several months. It was *held* that this justified a finding that A had notice of the lease.

2. ———: **Option: Extension: Holding Over: Election.** A tenant's lease was for three years, with a provision for an extension at his option, for two years more. The tenant never notified the landlord he desired the extension, but he held over and paid rent to the landlord for several months. It was *held* that this was an election to take the extended term; and that the original lease was a present demise of the extended term.

3. ———: **Renewal: Unlawful Detainer: Injunction.** Where a lease provides for a renewal in the sense that a new lease is to be executed and the landlord refuses to renew and brings unlawful detailer against the tenant, before a justice of the pease who has not equity jurisdiction, the tenant may by bill in equity enjoin the prosecution of the unlawful detainer action.

4. ———: ———: **Extension: Same Terms: Original.** If there is to be a renewal of a lease as distinguished from an extension, it must clearly appear from the writing that such was the intention of the parties; and where the renewal was to be on the same terms as the original, it will be regarded merely as an extension of the original.

5. **OPTION: Holding Over: Equity: Original Lease.** Where a lease for three years provides for an extension for two years, at the tenant's option, and he hold's over, he will be considered as holding under the original lease, and will not need the aid of a court of equity to maintain his right to the premises, since all of his rights may be asserted at law in defense in an action for unlawful detainer.

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Appeal from Jackson Circuit Court.—*Hon. William O. Thomas,* Judge.

REVERSED.

Sharp & Sharp and *Ed. E. Aleshire* for appellant..

W. F. Stafford for respondent.

ELLISON, P. J.—Plaintiff's action is founded on a bill in equity to restrain defendant from prosecuting an action for unlawful detainer against plaintiff. The judgment in the trial court was for plaintiff.

It appears that Laura S. Eddy owned the property in question. She executed a lease to C. C. Rhodes on the 9th of January, 1914, for three years containing a provision that "The said C. C. Rhodes is to have the option of two years extension of this lease at the expiration of his term herein at the same rental." Rhodes assigned the lease to plaintiff on the 27th of September, 1915, and the latter went into possession.

After executing the lease to Rhodes, viz, on the 30th of August, 1914, she gave a deed of trust on the property, which was foreclosed on the 8th of September, 1916, and Gertrude Zeller became the purchaser; and she, in the next month, to-wit the 20th of October, sold it to defendant Altman, plaintiff being then in possession as tenant under the assignment of the Rhodes lease to him. Defendant Altman notified plaintiff that he had become the owner of the premises and to thereafter pay the rent to him. Plaintiff thereupon did pay to him the rent reserved in the lease for several months, up to April, 1917; the months of February and March being after the expiration of the original three years term. They were consequently within the two year extension period provided in the lease.

The lease given by Laura S. Eddy to Rhodes was not recorded but the fact that the plaintiff was in possession of the property as a tenant and that the defendant notified him that he had become the owner and that he (the

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tenant) must pay the rent to him and that he accepted such rent for several months is evidence to fully justify the conclusion that defendant had notice of the lease. [Davis v. Briscoe, 81 Mo. 27, 37; Shafer v. Detie, 191 Mo. 377, 393; State Bank v. Frame, 112 Mo. 502, 509; Morrison v. Juden, 145 Mo. 282, 298; Quinn v. Valiquette, 80 Vt. 434, 447; 24 Cyc. 926.]

The lease being binding on defendant, the question arising on that fact is what rights has the plaintiff as tenant under the lease? We think that his holding over the original term (defendant acquiessing) and paying rent to defendant was an election to accept the extension for two years as provided in the lease. [Lewis v. Perry, 149 Mo. 257, 267, 268; Realty Co. v. Brecht, 109 Mo. App. 25; Insurance Co. v. National Bank, 71 Mo. 58; Miller v. Albany Lodge, 168 Ky. 755; Hurley Tobin Co. v. White, 84 N. J. Eq. 60; Kean v. Story Piano Co., 121 Minn. 198.] The lease may be said to be, in effect, a present demise for the term, as extended, with the right in the tenant to reject the extension, if he so elects.

But defendants have questioned plaintiff's remedy; and have affirmed that there was no necessity for a resort to equity, since every material part of his case could have been presented as defense in the unlawful detainer. If the provision in the lease were for a "renewal" for two years, and showed a new lease was intended, instead of an "extension" for that time, we could readily overrule the point since in that condition of case, under decisions in this State, it would require the interposition of equity to enforce a renewal provision by specific performance, and as a justice of the peace has not jurisdiction of questions in equity, the only remedy of the tenant, would be in the circuit court on a bill to restrain prosecution of the suit in unlawful detainer. [Finney v. Cist, 34 Mo. 303, 309; Blount v. Connolly, 110 Mo. App. 603.] But in those cases the lease contemplated the making of a new lease, if the tenant decided to keep beyond the original term. While in the case before us, the lease merely provides for an extension; no portion of it expressing, or

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showing, any intention to provide for a new lease by renewal.

If a renewal is to be had, "The lease must clearly and positively show that the making of a new lease was intended." [2 Underhill on Landlord and Tenant, sec. 803.] In some of the States the courts seem to refuse to recognize any distinction between the words "renewal" and "extension," except, we apprehend, in instances where, as stated by Underhill, a renewal by a new lease, clearly appears to be the intention. [Perry v. Lime Co., 94 Maine 325, 334; Orr v. Doubleday Co., 157 N. Y. Sup. 1009, 1012.] But in the absence of a provision of the nature, expressed by Underhill the courts are inclined to the view that there is no practical difference, between a "renewal" and an "extension:" [Howell v. City of Hamburg, 165 California, 172, 177.] And we think the latter class has been chosen in this State. [Insurance Bldg. Co. v. National Bank, 71 Mo. 58, 60-62.] We feel it to be clear that where the "renewal" of the lease is to be on the same terms as the original, it would be a useless thing to execute a new paper; and therefore, the tenant, on exercising his option, will hold under the original lease, as upon an extension for the extended period provided for in that lease. The original lease, as already suggested, is a present demise of the extended term to take effect upon the option of the tenant.

It being thus made apparant that the plaintiff (the present tenant) is holding the extended term under the original lease, and that there is no necessity for a new lease, he does not require the aid of a court of equity to maintain his right to the premises, since all his rights to the property may be asserted at law in the action for unlawful detainer; and so it has been decided. [Rapp v. Williams, 1 Hun. 716; Bade v. Wallace, 96 Ill. App. 370.]

It follows that the plaintiff having no occasion for relief has no standing in equity and therefore the judgment will be reversed. All concur.

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THE STATE OF MISSOURI at the relation and to the use of PETER H. HAYES, Respondent, v. W. J. HAILER, FRANZ O. MOERSCHEL and S. URBAN, Appellants.

Kansas City Court of Appeals, May 20, 1918.

DRAMSHOPS: Sureties on Bond: Liability for Personal Injuries. The plaintiff, a newspaper reporter, was assaulted and injured by the bar-keeper of a dramshop and thereafter sued the saloon-keeper and his bondsman for damages. It was *held* that the relator, having suffered a direct and personal injury from the positive and intentional act on the part of the dramshop's agent and bartender, in direct violation of the duty imposed by statute and guaranteed by the bond, namely "to keep at all times an orderly house," is entitled to recover on the dramshop-keeper's bond for a direct and positive violation thereof.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain*, Judge.

AFFIRMED.

C. C. Kelly for appellants.

Holmes Hall and *G. W. Barnett* for respondent.

TRIMBLE, J.—This is an action in the name of the State by relator on defendant Hailer's bond as a dramshop keeper, the defendant Moerschel and Urban being sureties thereon. There was a verdict and judgment for $150 and defendants have appealed.

The petition charges a breach of the bond on the part of said Hailer, and seeks to recover damages accruing to relator by reason of being injured on account of the failure to keep an orderly house, in that said dramshop keeper's bartender, Lopp, while engaged in his duties as bartender and in serving drinks in the barroom proper and in the adjacent rooms, alleged to be a part of the saloon, violently and without provocation assaulted rela-

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tor, Hayes, by seizing him by the throat and beating him in the face, cutting a gash over his eye and otherwise injuring him, and at the same time cursing and abusing him and applying to him vile and profane epithets; all being done while said Hayes was behaving himself in a peaceable and orderly manner and without having been requested to leave the saloon. The petition further alleged that said assault was committed in the presense of said Hailer but that he did not undertake to interfere with his said barkeeper in the latter's disorderly and inhuman conduct, and tacitly approved thereof and continued the said barkeeper in his employ although requested to disavow said disorderly acts and to discharge said barkeeper from his employ on account of said disorderly conduct and brutal outrage upon an inoffensive man.

There is no dispute over the fact that the assault was committed. Liability is denied on the ground that relator cannot sue the sureties on the dramshop bond for a violation thereof even though the relator be the party receiving direct, special and personal injury thereby. The defendants further claim that the assault and general disturbance arising therefrom took place either in the restaurant or kitchen attached to the saloon and not in the barroom proper and that the bondsmen are not liable for disorder therein. The evidence in relator's behalf amply tends to support his claim that the assult was begun in the barroom proper, the barkeeper commencing to beat relator in there and continuing to beat him after forcing him through the opening into the adjacent room. But as this was disputed, and as the trial court instructed the jury that, under the conceded facts, the adjacent rooms called the restaurant and kitchen were all a part of the dramshop and covered by the bond, it will be necessary to pass upon the propriety of this instruction if the other contention of defendants is found to be unavailing.

The conceded facts with reference to the saloon and restaurant, the conduct and management of the business and the arrangement of the building in which it is housed, are as follows:

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The saloon and restaurant had been run in connection and as one business enterprise for a great many years having been handed down to the present proprietor from his father. It was housed in a building which was seperate and apart from other buildings and fronted north on East Third Street. Across the entire front of the building was a large sign: "Hailer's Saloon and Restaurant." Partitions divided the ground flour into three rooms running north and south, the barroom proper being on the east side, the two others having tables therein at which lunches were eaten and drinks from the barroom were sold. Toward the rear or south end of the rooms were doorways in the partitions which were kept constantly open so as to afford free and open communication at all times between the barroom proper and the parts called restaurant and kitchen. At the rear or south end of the barroom was a toilet and at the south end of the restaurant portion a part was partitioned off into what is called the kitchen, but it also had tables therein the same as the part called restaurant. There was also an opening into it affording easy access thereto from the barroom and restaurant. Parties seated at tables were served with lunches, and also with drinks brought from the barroom. Said drinks were served by the barkeeper, *and he collected the money therefor at the tables* where they were served and drunk. In the restaurant room at the south end next to the kitchen was a lunch counter at which sandwiches could be obtained, and in the barroom proper was a smaller counter where they could also be had, though defendants' testimony conflicts with plaintiff's on this last point, namely, as to whether there was a lunch counter in the barroom proper. There is, however, no controversy over the fact that the barkeepers prepared drinks at the bar, took them into the restaurant room and kitchen, served them to the patrons seated at the tables and collected the money for such drinks *at the tables.* Patrons testified to this, and defendant Hailer's barkeeper testified that he was barkeeper for Mr. Hailer; that he considered it a part of his business to go into the restaurant or kitchen. "I was in

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there to help take care of the place. I was interested in there because I was in Mr. Hailer's employment." One of the defendant sureties on the bond testified, "I have drank lots of times in the restaurant room," and it was conceded that the other surety would testify the same way. The first-mentioned surety also testified that he had "not drank in the back room called the kitchen on many days." He further said he might have, but he didn't think he ever sat at the table and drank; he was not in the habit of going in the kitchen. He didn't think he had ever had liquor served to him at the tables in the kitchen.

Relator was, at the time in question, a reporter for a paper in Sedalia, and was accompanying a number of government officials visiting the city that day. The party entered the barroom proper and relator asked defendant Hailer if they could have a table. The proprietor assented and led them through the opening into the part called kitchen and seated them at a table. They sat here for a few minutes during which time drinks were ordered and, according to the evidence in plaintiff's behalf, were brought from the bar to the table where the party sat, and they were paid for at the table. The barkeeper, Lopp, who committed the assault, denies that he served the drinks to this particular party, but says another of defendant Hailer's barkeepers did. After a round or so of drinks were thus served, some one suggested sandwiches, and relator, acting somewhat as entertainer for the visitors, went into the room where the bar was to order them. After they were served, it was found that there was one sandwich lacking, in order to provide one for each member of the party. Relator again went back into the barroom proper to get the additional sandwich. The barkeeper, Lopp, because of his dislike for relator and because the latter was in his way in carrying drinks into the room from the bar, became angered at relator and, seizing him by the throat, began raining blows upon his face and head, and, forcing him back from the barroom through the opening into the restaurant portion, continued to beat him, calling him vile epithets and say-

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ing, "I don't like you any way." The party at the table sprang up and sought to interfere and for a time there was considerable disturbance. Most of the beating took place in the barroom proper, but the last few blows given relator were delivered near the table where the party sat. According to the evidence in plaintiff's favor the beating was stopped by one of the party seizing the bartender and pulling him off of relator. The visitors and others present described the beating as "brutal." After the trouble arose, defendant Hailer remarked to relator, "Get on out when he tells you to. Get on out when he tells you to" referring to his barkeeper. A friend took charge of relator who was bleeding and took him home in an automobile. Relator was not intoxicated and had done nothing out of the way or to provoke the attack. Before leaving, this friend said to defendant Hailer that it was the most brutal beating he had ever seen, and Hailer said, "come around to-morrow and we will fix it up." Thereupon the proprietor ordered everybody out not only of the room where the bar was but of all the rooms where there were tables, and closed up the entire place. The next day relator's friend saw Hailer and told him it was the most brutal assault he had ever seen and that he, Hailer, couldn't afford to keep a man like that in his employ; that he oughtn't to keep a man that would do a thing like that; it would give him trouble. Hailer refused to adopt the suggestion, saying that "Pete" (meaning relator) "had caused him trouble before."

The question to be determined is whether suit can be maintained at the relation of the one who has been directly and specially injured by the failure "to keep at all times an orderly house." Section 7196, Revised Statutes 1909, requiring a bond of a dramshop keeper before he can be licensed, says such bond shall be conditioned that he (1) "shall at all times keep an orderly house," (2) that he "will not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor in any quanity to any minor," (3) that he will not violate any of the provisions of the article on dramshops, (4) that he will pay all taxes on his

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stock of liquors and all fines, penalties and forfeitures adjudged against him under the provisions of the article relating to dramshops.

The bond was in due and proper form and conditioned as the law directs.

No point is made that the fighting and assault, together with the accompanying disturbance, done and created by the dramshop keeper's bartender and permitted by the proprietor in his presence and place of business and while the same was being carried on, did not constitute a failure to keep an orderly house, and, for this reason, was not a breach of said bond. Defendants' contention is that no recovery of damages can be had nor suit maintained at relator's instance or for his benefit because he is not the proper party under the statute to maintain the suit. Another statute, section 7198, provides for a civil action by two or more reputable tax paying citizens, as relators, for the forfeiture of said bond and for the taxing of a penalty of not less than $100 to go to the school fund together with a reasonable attorney's fee. Another statute, section 7213, provides for the recovery of a penalty of $50 for selling liquor to any minor, said penalty to go to the parent, master or guardian of said minor; while still another statute, section 7223, provides for the recovery of a penalty of not less than $50 nor more than $500 for selling (after notice) to an habitual drunkard, such penalty to go to the wife. father, mother, brother, sister, child or guardian of such drunkard, and involving the forfeiture of the dramshop license. Each of said last named sections makes the act therein specified a misdemeanor punishable by fine.

The statute nowhere expressly says that damages may be recovered by anyone specially injured by the failure to keep at all times an orderly house, and for this reason defendants say this suit for damages cannot be maintained.

There is no question but that where a statute creates a new right and prescribes a remedy, the statutory remedy is exclusive; but in this instance the statute provides

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for the giving of a bond conditioned, first, that the dramshop keeper "shall keep at all times an orderly house" and then that he shall not sell to minors, nor to drunkards and shall pay all fines and forfeitures imposed for a violation of the dramshop law. The remedies provided by sections 7198, 7213 and 7223 do not relate to the recovery of *damages* by one suffering a direct and special injury from an active breach of the bond in relation to keeping an orderly house at all times. In fact, the statutory remedies do not relate to *damages* at all, nor to a cause of action on the bond to compensate a person for injuries received through a breach thereof; they relate solely to the recovery of *penalties* wherein no pecuniary damages need be shown. No cause of action for *these* could exist aside from the statute; and the fact that remedies for them are provided does not exclude a cause of action for damages personally accruing from the positive intentional act of the dramshop keeper, through his agent and bartender, constituting a violation of his bounden duty to keep at all times an orderly house. The statute requires of the dramshop keeper a bond for the faithful performance of his duty in this regard; and while it is silent as to the right to sue thereon for damages directly and specially arising therefrom and as to who can exercise that right, yet there is nothing therein tending to exclude the exercise of such right. As to it the statute merely says nothing; and the remedies *expressly* provided for are rights which could by no possibility come into existence unless affirmatively created by statute. But at common law the dramshop keeper is responsible for the assaults of his agents under the circumstances of this case, and the only effect of the bond as to such matters is to guarantee that the same will not occur. In other words, the statute having required a bond for the faithful performance of duty, and relator, as a peaceable, unoffending patron legally in the dramshop keeper's place of business, is entitled to an observance of that duty, and being personally and specially injured by the failure to perform that duty, has a cause of action on the bond. Being the party injured by the breach of the bond,

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he is the real party in interest and, as relator, is entitled to have the suit maintained. [Section 1729, R. S. 1909.] Frequently, statutes provide for the giving of bonds, made payable to the State, for the performance of some duty or obligation concerning which it is not provided who may sue thereon, but "where there's a right, there's a remedy" and it has been held that one suffering a special injury from a breach of the bond and to whom the obligation is owed, may sue thereon. For instance, a recorder of deeds is required to give bond for the faithful performance of his duties and no provision is made as to who may sue thereon or under what circumstances suit may be brought. And yet a recorder was held liable on his bond for a breach thereof toward one to whom he owed that duty and who was specially injured by the breach thereof. [State ex rel. v. Green, 124 Mo. App. 80.] [See, also, Scott v. Missouri Pacific R. Co., 38 Mo. App. 523.] That a bond inures to the benefit of one entitled to the performance of the duty for which the bond is given, and can be sued on by such a one injured by the breach thereof, is held in Young v. Young, 52 N. E. 776; American Surety Co. v. Thorn-Holliwell Cement Co., 57 Pac. 237; People v. Cotteral, 115 Mich. 43; School District v. Livers, 147 Mo. 580; City of St. Louis v. Von Phul, 133 Mo. 561; Devers v. Howard, 144 Mo. 671.

In Squires v. Michigan Bonding Co., 138 N. W. (Mich.) 1062, it is held that a saloon keeper's bond, being for the benefit of the public and not strictly contractual in nature is to be construed according to the purpose, intent and meaning of the statute pursuant to which it is given, and not according to the strict rules applicable to private contracts of suretyship. Certain it is that if the action in the case at bar cannot be maintained, then individual citizens or members of the body politic have no protection by reason of said bond. If a person is beaten up and abused by the saloon keeper or his agents while in the saloon, then the only redress afforded by the bond is to have two reputable taxpaying citizens to bring suit for the forfeiture thereof, provided they will volunteer to run the risk. We do not think this is

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the intent and meaning of the statute nor the limit of its purpose in requiring the saloon keeper to give security against the happening of such occurrences. The business engaged in is of a character likely to result in such things, and the saloon keeper gives a bond that he will not permit or suffer them to be done, and his sureties are well aware of the nature of the business they agree to guarantee shall be conducted in an orderly manner, and for a saloon keeper, through his agent and bartender, to beat up an unoffending patron of his place of business and then go free of all liability on the bond because it does not cover such matters is to restrict within too narrow limits the language of the bond and the object and intention of the statute requiring one to be given. The remedies expressly provided by other statutes relate to police powers for the protection of the *public* and the *public morals* where no pecuniary rights of an individual are *specially* affected. Hence such remedies do not exclude by implication an individual remedy to redress an individual wrong. The two classes of remedies are wholly separate and distinct.

It is next contended that the obligation of the bond did not cover the rooms used in connection with the barroom denominated restaurant and kitchen. The conceded facts show that the restaurant room, the kitchen and the barroom, were all used in connection with each other wherein to sell drinks and carry on the business of retailing intoxicating liquors. The whole formed and was conducted as one business, so that, the restaurant room, the kitchen and barroom, in reality, constituted the premises and a part of the saloon, each being a mere department of the other. And the fact that there was a front door to each of said rooms numbered respectively 526, 528 and 530 and the license called for the location of the saloon at 530 did not make them separate. The business, as operated, was that of a saloon and restaurant combined, intermingled and mutually interchangeable, *and the sureties knew this when they signed the bond.* There is no doubt but that the bond and the obligation thereof should not be stretched to

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cover a "place" or "location" different from that for which it was given and the license was granted. But by the very terms of section 7196, the bond covers the dramshop keeper's "house" and "premises." So that where the entire premises are used as a saloon and for the sale of intoxicating liquor under the license granted, the bond should and does cover the premises so used and not merely the compartment where the liquors are stored or where the sale thereof is made to standing customers at a counter called a bar, when other sales are made, in an adjoining and openly connected compartment, to other customers seated at tables. The saloon keeper in this case had but one license and if the open and adjacent rooms were not a part of his saloon, then he was violating the law in selling liquors therein. He himself recognized it as all one place for when he realized the possible consequences arising from what his agent had done, he ordered everybody out of all rooms and closed them up. In Horan v. Travis Co., 27 Tex. 266, a bond was held to cover premises much more separated than the rooms here involved. See, also, Adams v. State, 146 S. W. 1086, where it is held that a disturbance occurring in a small inclosure behind the saloon-keeper's place of business, but under his charge and control, was covered by the bond. In Whitcomb v. State, 21 S. W. 976, it was held that the bond covered an arbor located back of the saloon and separated from it by an alley, the arbor containing tables at which patrons were served with drinks from the saloon.

We are of the opinion that relator, having suffered a direct and personal injury from the positive and intentional act on the part of the dramshop keeper's agent and bartender, in direct violation of the duty imposed by statute and guaranteed by the bond, namely "to keep at all times an orderly house," is entitled to recover on the dramshop keeper's bond for such direct and positive violation thereof, and hence affirm the judgment. All concur.

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JACK H. LONGWELL, by C. A. LONGWELL, his Next Friend, Appellant, v. KANSAS CITY, MISSOURI, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **NEGLIGENCE: Municipal Corporations.** Kansas City is the owner of a pleasure ground called "Swope Park" and maintained therein, among other forms of amusement, Shetland ponies for a profit, and invited all children to ride them for their pleasure and amusement. The agent of the city negligently put plaintiff upon the back of one of the ponies and started him off unattended and plaintiff was thrown by the pony and injured. It was *held* that the city having undertaken to provide these ponies for the amusement, recreation and pleasure of children, it was liable for negligence of its agents and servants in handling such children and ponies.

2. ———: **Ultra Vires: Charter of Kansas City.** The provisions of the charter of Kansas City prohibiting "shows" or "exhibitions" in parks or public grounds has no application to children riding on Sheland ponies in such parks. The riding of ponies by children for pleasure, amusement and recreation in public parks is not a "show" or "exhibition."

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney*, Judge.

REVERSED AND REMANDED.

Kimbrell & O'Donnell for appellant.

J. A. Harzfield and *Francis M. Hayward* for respondent.

BLAND, J.—This is an appeal from the action of the court in sustaining a demurrer to the petition in an action for personal injuries. The following negligence was alleged; that on or about the 29th day of March, 1896, defendant became the owner of a pleasure ground and park, called "Swope Park," by virtue of a deed of conveyance delivered to it by one Thomas H. Swope,

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which was accepted by defendant; that one of the conditions of said deed was that the land "shall be used as a public pleasure ground or park forever;" that on the 29th day of August, 1916, defendant was maintaining said ground as a public park and was maintaining restaurants, boating, pleasure grounds, zoological gardens and Shetland ponies thereon. That defendant had established a rule or custom by virtue of which, and for a profit to it, all children visiting said park were invited to ride upon said ponies in said park for their enjoyment, recreation or amusement, paying to it as a fee or charge therefor the sum of five cents; that on said day plaintiff was in said park for the purpose of obtaining the recreation and air provided by said defendant therein; that defendant's agent and servant, in accordance with said rule or custom invited plaintiff to ride upon one of said ponies and that plaintiff paid therefor the required fee of five cents; that thereupon said agent and servant seized the plaintiff and negligently placed him on the back of one of said ponies, whereupon said agent and servant negligently turned said pony loose, unattended, in the enclosure where it was kept and it became unmanageable and ran, jumped and cavorted so that plaintiff was thrown upon his back on the ground, resulting in plaintiff's injury; that plaintiff at the time was too immature and inexperienced to ride upon or guide said pony unattended with reasonable safety to himself; that plaintiff's legs were too short and the back of said pony too broad and round to enable plaintiff to maintain his seat thereon; that said pony had a vicious and unmanageable disposition and that all of said facts which caused the injury were known to defendant's agent or could have been known, etc.

It is the contention of the defendant that the act of the city in maintaining said ponies and in allowing plaintiff to ride thereon, under the facts and circumstances alleged, was *ultra vires*. To this plaintiff makes two answers; first, that the act was not *ultra vires;* and second, that the city in taking hire for said ponies is

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estopped from setting up the claim of *ultra vires*. The second contention of plaintiff we need not pass upon. There is no contention in this case at this time but that the city, if it was acting within the powers granted to it in its charter to maintain a public park, is liable to plaintiff for the injuries sustained by him. The question presented to us is whether or not the maintenance of said ponies for the purposes described in the petition was within the power of the city.

It is said in State ex rel. Wood, Attorney General, v. Schweickardt, 109 Mo. l. c. 510, that "a park is variously defined to be 'pleasure ground in or near a city set apart for the recreation of the public;' 'a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament' . . . 'a place open for eveyone.'" There is no doubt but that in order to provide means for recreation, air, exercise and amusement, etc., in a park a city may either secure the services of someone to provide these means or may provide then itself. And if the city in this case, in providing the Shetland ponies for recreation of children, was within the legitimate sphere of its authority then the discretion vested in it in making such provision is free from outside interference and not subject to judicial revision or reversal. [State ex rel. v. Schweickhardt, supra, l. c. 511.]

We have made a diligent search in the books but have found but two cases decided by the courts in this country involving the question as to what is within the legitimate exercise of the discretion vested in a city in affording pleasure, exercise and amusement, etc., in public parks. One of these cases was decided by the Supreme Court of our State, cited supra, wherein it was held that the city was within its rights in leasing or renting space in a park for the purpose of furnishing refreshments to those visiting it; the other was decided by the Supreme Court of West Virginia, where it was held that a lease by a city of a part of a public park to improve it and use it at times for training and running race horses, for a rental to the city, reserving

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access at times to the public for riding and driving on the track, was a legitimate use of the park and not an *ultra vires* act. [Bryant v. Logan, 56 W. Va. 141.] The court in the latter case, l. c. 145, states that regardless of the broad powers in this connection granted the city by the Legislature, nevertheless, the act of the city complained of was not an unlawful diversion of the park, the court saying, "racing horses is enjoyed by thousands and thousands of people, high and low, rich and poor. The use of the park for this purpose would give people recreation and pleasure, and it is not foreign to the object for which it was purchased," it having been acquired "for the health, pleasure and comfort of the people."

Parks are particularly inviting to children who live in cities. It is a matter of common knowledge that cities go to great expenses to condemn valuable property upon which there are improvements for the purpose of affording parks that are devoted exclusively to play grounds for children. And while public parks usually are resorts for persons both old and young, it may be said that they are particularly designed for the amusement and recreation of children and a place where they may go to play in the open air and light. It is hard to imagine a more appropriate way, if properly conducted, for the city to provide exercise and enjoyment for children than was afforded in this case. We think that the use of a park for the purpose of providing Shetland ponies of reasonable gentleness upon which children may ride, properly attended, either for a consideration or *gratis,* afford, beyond doubt, exercise, amusement, recreation and pleasure for such children, and is not foreign to the object for which public parks are maintained, and that the city, having undertaken to do these things is liable for negligence in the doing of them.

It is contended by the defendant that the maintenance of these ponies in the manner described in the petition is prohibited by defendant's charter. In support of this contention it refers us to section 39, article 13, of the Kan-

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sas City Charter, 1909, which provides, among other things, as follows:

"And no shows or exhibitions of any character or kind shall be allowed or given in any park, square, or public ground of the city under control of said Board; but this shall not inhibit such musical entertainments, concerts and zoological or other exhibits as may be provided by the Board of Park Commissioners in any park, for the use and enjoyment of the public and for strictly park purposes."

Defendant contends that in this provision of the charter the only kind of "shows" or "exhibitions" that may be maintained in a public park in Kansas City are those provided by musical instruments, concerts and zoological or other exhibits of the same general kind and character. We fail to see how this provision has any application to the matter of children riding on Shetland ponies in any such park. The riding of a pony either for hire or *gratis,* we think, is not a show or an exhibition. Webster defines a "show" as "That which is shown, or brought to view; that which is arranged to be seen; a spectacle; an exhibition; as a traveling *show;* a cattle *show.*" And an "exhibition" as "That which is exhibited, held forth, or displayed; also, any public show; a display of works of art, or of feats of skill, or if oratorial or dramatic ability; as, an exhibition or animanls; an exhibition of pictures, statutes, etc.; an industrial exhibition." A show or exhibition is commonly understood to be something that one views or at which one looks and at the same time hears. We fail to see how the riding of ponies, such as described in the petition in this case, can be said to be a show or exhibition.

We do not feel that the city in doing the things described in the petition was acting *ultra vires,* and for this reason the judgment will be reversed and the cause remanded and is so ordered. All concur.

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CHARLES DRAPER, Respondent, v. THE KANSAS CITY RAILWAYS COMPANY, Appellant.

Kansas City Court of Appeals, May 20, 1918.

1. **Negligence: Street Cars: Unreasonable Speed.** Whether a person, injured when struck by a street car, was guilty of contributory negligence as a matter of law in failing to look again for an approaching car after he had already looked and could only see one a hundred feet away, depends on what was a reasonable rate of speed for street cars, under the circumstances, and whether he would then have had time to cross the street car track and avoid being struck had the car been running at a reasonable rate of speed.
2. ———: **Humanitarian Rule: Question for Jury.** If the motorman of a street car saw, or could have seen, a person in a confused or terrorized state standing apparently unable to decide how to get off the street car tracks, it was his duty at that time to slacken the speed or stop his car.
3. ———: **Duty of Motorman: Maintain Lookout.** It is the duty of a motorman of a street car to maintain such a lookout as will enable him to see the first appearance of danger and his employer will not be liable for failure to maintain such a lookout unless the danger appeared soon enough to use means to avert it.

Appeal from Jackson Circuit Court.—*Hon. William O. Thomas,* Judge.

REVERSED AND REMANDED.

Clyde Taylor and *Charles A. Stratton* for appellant.

Park & Brown for respondent.

BLAND, J.—Plaintiff recovered a verdict and judgment for damages for personal injuries and defendant has appealed. The case must be reversed and remanded as plaintiff confesses error in his instruction on the measure of damages. However as the case is to be retried, it is necessary for us to pass upon the other points raised by defendant.

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Defendant's first point is that its demurrer to the evidence should have been sustained. The evidence taken in its most favorable light to plaintiff shows: that on the 13th of August, 1915, he was a passenger on a westbound car belonging to defendant's predecessor, running along Ninth Street, a street in Kansas City, Missouri, running east and west; that when the car reached Bales Avenue in said city he alighted from the front end thereof (the car stopped on the west side of Bales Avenue); that when he alighted he looked toward the east and saw another car approaching about a block away; that he then looked toward the west but could see no further than Benton Boulevard, which was two blocks away, for the reason that the street perceptibly fell from Benton Boulevard toward the west; and that when he looked toward Benton Boulevard there was no eastbound car approaching upon the eastbound track, which ran to the south of the westbound track.

The car remained stationary about one minute to take on one or more passengers. After looking to the west plaintiff proceeded to the rear end of the car in order to pass behind it and cross the street to the south. When he reached a point on the westbound track the car from which he alighted was about ten (10) or fifteen (15) feet away from him and at this point he looked "around the car" but could only see one hundred (100) feet west along the eastbound track. At that time he saw no eastbound car. He then proceeded to the south across the eastbound track without again looking in either direction. When he reached the middle of the eastbound track he heard someone shout, "Hey." He thought the shout came from someone who had alighted from the westbound car at the same time he had, so he turned and looked up in the direction of the retreating car and saw an eastbound car approaching him 75 to 100 feet away, proceeding at a rate of speed of thirty miles per hour. The motorman of the last-mentioned car was the person who had shouted to plaintiff. When plaintiff saw the eastbound car approaching him at such a terrific rate of speed he became confused by the impending danger. He

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first thought that he would return and cross the westbound track but remembering that he had seen a car approaching from the east on that track he thought he had better not take any chances and made up his mind to proceed onward across the eastbound track, but before he could do so, the eastbound car was upon him. He jumped "right straight up" just before the car struck him.

The evidence shows that no signal of any kind was given by the motorman of the eastbound car except the shouting above mentioned. It also shows that the motorman did nothing whatever to stop or slacken the car until after he struck plaintiff, and that he stopped the car within sixty (60) or sixty-five (65) feet after striking him.

As before stated, the evidence shows that the distance from Bales Avenue to Benton Boulevard was two blocks, Indiana Avenue being the street between. The distance from Benton Boulevard to Indiana Avenue is six hundred and forty (640) feet from Indiana to Bales Avenue four hundred and ninety-four (494) feet. There was a drop of .78 per cent. in the grade of the street toward the east from Benton Boulevard to Indiana Avenue and from Indiana Avenue to Bales Avenue of 3.03 per cent. The motorman testified in effect that he saw plaintiff two hundred and forty-seven (247) feet before he struck him but that he did not check his speed when he first saw him and that he did nothing toward stopping the car until he got about thirty (30) feet from him. As before stated, plaintiff was on the westbound track when he looked around the corner of the car from which he had alighted and could see only one hundred feet west. From this we must assume that when the motorman, 247 feet west of plaintiff, saw him, plaintiff must have been approaching the eastbound track.

The case was submitted to the jury upon two theories; the first being upon that of excessive speed, plaintiff pleading and proving an ordinance of Kansas City providing that, "and all cars shall be run at all times and places at a reasonable rate of speed under the particular

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circumstances." This was the ordinance granting defendant's predecessors their franchise. The second theory upon which the case was submitted was the "humanitarian" or "last chance" doctrine.

We will take up the excessive speed theory first. Defendant contends that plaintiff: was guilty of contributory negligence as a matter of law in not looking again for east bound cars after he looked and could see only one hundred feet west. Whether or not plaintiff was guilty of contributory negligence in not again looking would depend entirely on the circumstances. In looking for eastbound cars he was only required to use ordinary care to see a car approaching and in discharging this duty he was required only to place himself in a position where he could have a view of the track for a sufficient distance to enable him to see an approaching car (if one were present) far enough away that he could, by the exercise of ordinary care, then cross over the track in safety. There is nothing in the evidence in the way of an ordinance, or otherwise, to show directly what was a reasonable rate of speed. Under such conditions this was a question for the jury. However, whether plaintiff was guilty of contributory negligence would depend entirely upon what was an unreasonable rate of speed for cars under the circumstances and whether he would have had time to cross the eastbound track before being struck by a car that was not proceeding at such a rate of speed, had one been coming one hundred feet away at the time he looked for eastbound cars. The street car tracks were notice to plaintiff of danger and he could not assume that there was no car coming without looking nor could he assume that there was no car approaching the one hundred foot point at which he looked. Therefore, if he did not have time to cross the eastbound track before a car running at less than an unreasonable rate of speed could reach him, then he was guilty of contributory negligence. If he did have time to so cross, then he was not guilty of negligence. [Schrauchon v. Met. St. Ry. Co. 232 Mo. 587.]

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On the theory of the "humanitarian" or "last chance" doctrine the evidence shows that when the motorman shouted to plaintiff the car was seventy-five (75) to one hundred (100) feet away, so we may assume that it was one hundred feet away. Plaintiff testified that if at that time he had not become confused, he could have either retraced his steps and gotten off the track and avoided the injury, or he could have gone forward and escaped the injury by getting off the track. Defendant's contention, in view of these facts, is that plaintiff was not in a position of peril until the car reached this point and that the motorman was under no obligation to do anything toward averting an impending accident until this time. As we have before stated, the motorman testified that he saw plaintiff two hundred and forty-seven feet away and at that time plaintiff must have been approaching a position of danger. Whether the motorman was required to do anything before he reached the point one hundred feet distant from plaintiff, we believe there was sufficient evidence to go to the jury as to whether he could have slackened the speed or stopped the car after reaching this point and so have averted the accident. It was for the jury to say, under the facts shown in this case, whether or not plaintiff evidenced to others confusion or terror after being shouted to by the motorman and whether the motorman saw or, by the exercise of ordinary care, could have seen such a manifestation. If the motorman saw or could have seen plaintiff in a confused or terrorized state and standing apparently unable to decide how to get off the track, it was his duty at that time to have slackened the speed or stopped the car. The evidence shows that instead of doing this he did nothing whatever to avoid these things until after he struck the plaintiff, and that he stopped the car within sixty or sixty-five feet after striking him. Under these facts it was for the jury to say whether the motorman was guilty of negligence under the humanitarian doctrine. [Gordon v. Railway, 153 Mo. App. 555; Shipley v. Railway, 144 Mo. App. 7; Moore v. United Rail-

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ways Company, 185 Mo. App. 184; Holzemer v. Met. St. Ry. Co., 261 Mo. 379.]

That part of plaintiff's instruction No. 2 covering the duty of the motorman to keep a vigilant watch is erroneous. The duty of the motorman was to maintain such a lookout as would enable him to see the first appearance of danger and defendant would not be liable for the failure of such motorman to maintain such a lookout unless that danger appeared soon enough to use means to avert it. This part of the instruction entirely ignores the facts that would constitute liability on the part of the defendant. While it is possibly not reversible error, we see no reason why the vigilant watch element and the theory of excessive speed should be combined in one instruction, as is done in plaintiff's instruction. No. 2. Defendant attacks plaintiff's instruction No. 4. We see no defect in this instruction except it does not require the jury to find that the motorman saw, or could have seen, plaintiff in the terrorized state. Even if plaintiff happened to get into such a state by his own negligence, if was the duty of the motorman, for humanity's sake, to use means to prevent striking plaintiff if he saw, or could hace seen, by the exercise of ordinary care, the situation. [Shipley v. Railway, supra.]

Defendant's attack on plaintiff's instruction No. 1, is not well taken.

Defendant's instruction D6 was properly refused. It told the jury that plaintiff was guilty of contributory negligence if he did not continue to look for the approach of eastbound cars. If the facts on a new trial show that plaintiff was not guilty of contributory negligence in not again looking, a question we have already covered, then he was not required as a matter of law to look again.

The judgment is reversed and the cause remanded. All concur.

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FARMERS SAVINGS BANK OF WEST PLAINS, MISSOURI, Appellant, v. AMERICAN TRUST COMPANY OF WARRENSBURG, MISSOURI, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **BANKS AND BANKING: "Kiting Checks:" Acceptances.** The stamping of checks by a bank, upon which the checks were drawn, as "paid" does not have the effect of an acceptance of an inland bill of exchange, which is irrevocable, where the bank's conduct is induced by fraud. A bank which assumes to pay a check drawn upon it, may countermand its action, where its conduct is induced by fraud and where the rights of third parties have not intervened.

2. ———: ———: ———: Where there is a "kiting" operation being conducted by a depositor in each of two banks, there is no presumption in the absence of evidence that one bank knows the condition of a depositor's account in the other bank but such evidence may be established by inference. So where for seven months a "kiting" operation has been in existence and over $600,000 in checks have passed between two country banks and where the defendant bank claimed to be innocent of knowledge of the "kite" but knew that its depositor had no property and was judgment proof and it received blank checks signed by the depositor of the other bank to take care of any checks coming in signed by its depositor and its depositor had no funds with it except the worthless checks of the depositor in the other bank, there was evidence for the jury on the question of defendant bank's knowledge of the fraudulent "kiting" of checks.

3. **NEGOTIABLE INSTRUMENTS: Bills and Notes: Checks.** The action of a bank in holding the checks for more than twenty-four hours without returning them, does not constitute an acceptance of them and make the bank liable for the amount of the checks (section 10107, R. S. 1909) where it is shown that the bank called up the other bank which issued the checks and notifield it that it would not pay them and that no demand had been made for their return.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain*, Judge.

REVERSED AND REMANDED.

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H. D. Green, Wm. Green, M. E. Morrow and *George W. Barnett* for appellant.

Nick M. Bradley for respondent.

BLAND, J.—This is a suit on two checks drawn by one Burton on the defendant in favor of one Workman. The verdict and judgment was in favor of the defendant and plaintiff has appealed. The facts show that from January, 1915, to August, 1915, Burton and Workman were engaged in the cattle business at West Plains, Missouri; that Workman was a depositor of the plaintiff, or the West Plains bank, and Burton a depositor of the defendant, or the Warrensburg bank; and that during that time what was described in the evidence as a "kite" was going on between Burton and Workman. For convenience plaintiff will be referred to as the West Plains bank and defendant as the Warrensburg bank.

The evidence shows that the West Plains bank had a correspondent in the city of St. Louis through which it made out of town collections and that the Warrensburg bank had a correspondent in Kansas City through which its out of town collections were made. The evidence shows that the "kiting" was carried on as follows: Workman and Burton desiring to obtain a credit in favor of the former in the West Plains bank, the latter would draw a check or checks on the Warrensburg bank in favor of Workman who would deposit it or them to his credit in the West Plains bank. It would take three or four days after the check was drawn for it to reach the Warrensburg bank for payment and in the meantime, in order to show a credit in the Warrensburg bank in favor of Burton sufficient to take care of Workman's check, Workman would draw a check or checks in favor of Burton on the West Plains bank. These latter checks would be deposited in the Warrensburg bank before Burton's check reached it. As before stated, this system of "kiting" had been in progress from January, 1915, to August, 1915, and during this time something like six hun-

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dred thousand ($600,000) dollars in checks had passed between the two banks.

It was the understanding between Burton and the Warrensburg bank that the former should not be permitted to overdraw his account, so Burton would give the Warrensburg bank checks on the West Plains bank signed by Workman with the amount left blank so that the Warrensburg bank might fill in the necessary amount to cover any of Burton's checks that came in. The secretary of the Warrensburg bank testified that he knew nothing of the financial standing of Workman but he knew that Burton, who was a resident of Warrensburg, had no property which could be reached by execution; that he had done business with Burton once before and that he had no capital then. Neither Burton nor Workman had any money in either of these banks except these "kited" or fraudulent checks.

During the latter part of July, on account of the enormous number of checks coming through the West Plains bank, its president began to suspect that there was a "kite" in existence between Burton and Workman. On August 1, the bank examiner came into the West Plains bank and told its president that there was a "kite" going on. On August 5th, Workman deposited the two checks sued upon in the West Plains bank, which were drawn on the Warrensburg bank and were signed by Burton; one in the sum of twenty-seven hundred, forty-eight and 50-100 ($2748.50) dollars and the other in the sum of forty-five hundred ($4500) dollars. The evidence is conflicting as to whether these checks were taken by the West Plains bank for collection or as a deposit to Workman's account. The West Plains bank, following its usual course, sent these checks to its St. Louis correspondent who in turn, on August 7th, forwarded the same to the Warrensburg bank. The checks were received by the president of the latter early on the morning of August 9, 1915. Upon receipt of these checks the president of the Warrensburg bank examined Burton's account and found that, on account of various checks of Workman that Burton had deposited and which were on

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their way to the West Plains bank for payment, Burton had an apparent credit sufficient to meet the amount of these checks, and the president of the Warrensburg bank marked these two checks "paid" and drew a draft for their amount upon its correspondent in Kansas City. Shortly thereafter the correspondent in St. Louis of the West Plains bank, at the request of the latter, called up the Warrensburg bank over the long distance telephone and asked it if these two checks had been paid and its president replied that they had. Within an hour or two thereafter, a bank examiner came into the Warrensburg bank and informed its president that he had been sent there to investigate a "kite" that had been going on between Burton and Workman. The president and secretary of the Warrensburg bank testified that this was the first they knew of any "kite" existing between said parties. After the president of the Warrensburg bank had talked to the bank examiner the former called up the West Plains bank and asked if it did not have some checks on the Warrensburg bank "that had been sent in transit" (meaning checks drawn by Workman in favor of Burton on the West Plains bank and deposited in the Warrensburg bank, upon which the apparent credit described in the Warrensburg bank was based.) The West Plains bank replied that it had the checks and would refuse to pay them, and the president of the Warrensburg bank then stated to the West Plains bank that it would refuse to pay the two checks involved in this suit and would notify the correspondent in St. Louis of the West Plains bank to this effect, which was done by long distance telephone. The correspondent of the West Plains bank was also notified that payment would be stopped upon the draft drawn on the Kansas City correspondent of the Warrensburg bank, which was done, and the word "paid" was erased from the two checks mentioned.

Plaintiff's first point is that the court should have given its instruction in the nature of a peremptory instruction to find for plaintiff. In this connection plaintiff urges that the Warrensburg bank's acceptance of the two checks sued on was equivalent to a certification of

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the checks and amounted to the same as an acceptance of an inland bill of exchange, and it became unconditionally bound to pay said checks and that such acceptance was irrevocable. This contention is not well taken, for the reason that where a bank is induced by fraud to certify the check of a depositor for an amount in excess of his deposit it may countermand payment unless the rights of other parties have intervened (5 R. C. L. 526), and, of course, the same rule obtains where the bank has assumed to pay a check that it does not certify and is in a position to countermand its action, as in this case.

The defense of fraud was tried on the theory that if the Warrensburg bank had no funds belonging to Burton in its bank with which to pay the checks in question other than the worthless checks of Workman, and that the West Plains bank knew that said worthless checks were held by the Warrensburg bank and knew that the Warrensburg bank relied upon said checks being good, and knew that Burton had no other funds except the worthless Workman checks in the Warrensburg bank with which to meet the checks, and that the Warrensburg bank did not know of the fraudulent "kiting" at the time it marked "paid" the two checks in suit, and that the West Plains bank induced the Warrensburg bank to accept and pay the checks by its fraudulent conduct, then plaintiff was not entitled to recover.

Defendant insists that there is no evidence that the West Plains bank knew the condition of Burton's account in the Warrensburg bank; that for all the West Plains bank might have known, the Warrensburg bank had funds, in addition to the Workman checks, to satisfy the two checks in suit. There is no direct evidence that the West Plains bank knew that the Warrensburg bank had no funds of Burton except the fraudulent Workman checks, but from the evidence such knowledge may be inferred. The evidence shows that the West Plains bank knew that there was a "kite" going on when it took the two checks in suit; it knew that this had been going on for some time and knew that more than six hundred thousand dollars ($600,000) in checks had been drawn. If Burton

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had funds in the Warrensburg bank sufficient to cover the checks issued by him, other than the worthless checks of Workman, why was it necessary that a "kite" be conducted? We think the jury could say that as the West Plains bank knew there had been a "kite" in existence for some time it also knew that the Warrensburg bank had no funds of Burton other than the worthless checks of Workman.

Plaintiff urges that the court erred in refusing to give its instruction No. 2, which told the jury that if the Warrensburg bank in receiving the two checks in controversy held the same for more than twenty-four hours without the consent of plaintiff, without returning the same, its conduct constituted an acceptance and made it liable for the amount of the checks, and the verdict should be for the plaintiff. The court gave this instruction in a modified form by adding, "unless you find and believe from the preponderance of the evidence that the defendant is entitled to recover on the issue of fraud as defined in other instructions." It is plaintiff's contention that section 10107, Revised Statutes 1909, providing that if a drawee, to whom a bill is delivered for acceptance, refuses within twenty-four hours after delivery to return the bill accepted or not accepted to the holder, he will be deemed to have accepted the same, now applies to checks. [See section 10155(R. S. 1909.] Assuming that section 10107 does apply to checks, nevertheless, we think the court did not commit error in reference to this matter. The president of the Warrensburg bank called up the West Plains bank and notified the latter that it had refused to pay the checks. Plaintiff's correspondent at St. Louis was also notified. There was no demand made by the West Plains bank or anyone for it for the return of the checks and none of the parties could have been misled by the action of the Warrensburg bank in not returning them within twenty-four hours. It is doubtful if this statute applies at all in fraud cases such as this one.

Plaintiff contends that the court erred in refusing to give its instruction No. 6. This instruction told the

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jury that the West Plains bank was not presumed, in the absence of knowledge to the contrary, to know the condition of Burton's account in the Warrensburg bank, and that the West Plains bank had a right to rely upon the presumption that defendant did know the condition of such account unless they believed from the greater weight of the evidence that the West Plains bank as a matter of fact did know of the condition of Burton's account in defendant bank. The court gave this instruction in substantially the same form in another instruction given on its own motion which applied the rule stated in said refused instruction to both banks. Therefore, we think that the court did not err in refusing plaintiff's instruction No. 6 and in giving an instruction of its own on this question.

Plaintiff urges that the court erred in giving instruction Nos. 9 and 10 on behalf of the defendant and in refusing to give instruction No. 4 asked by plaintiff. Instructions Nos. 9 an 10 permitted the jury to find for the defendant without finding that the Warrensburg bank an ignorant of the "kite" and relied upon the failure of the West Plains bank to impart the knowledge that a "kite" was in existence. Plaintiff's instruction No. 4 required the jury before it could return a verdict for defendant to find that the West Plains bank by fraud induced the Warrensburg bank to pay the checks and at the time knew that the Warrensburg bank had not sufficient funds on deposit to Burton's credit, other than the worthless checks of Workman, to pay the checks forwarded, and that the West Plains bank through its officers knew that the Warrensburg bank was deceived by such worthless checks and believed them to be good.

Defendant contends that there is no evidence in the record that the Warrensburg bank knew that there was a "kite" in existence and that therefore it did rely upon the failure of the West Plains bank to disclose all the facts. We think there is some evidence to go to the jury upon this point. The Warrensburg bank knew that Burton had no property and was judgment proof. For seven

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months he had been carrying on a large business with the Warrensburg bank and the only funds that he had on deposit there at the time of these transactions were the checks of Workman. As already stated, the transactions between these two banks amounted to more than six hundred thousand ($600,000) dollars. The Warrensburg bank had on understanding with Burton that his accounts should not be overdrawn and Burton gave to the Warrensburg bank Workman's checks drawn on the West Plains Bank with the amounts left blank to be filled in by the Warrensburg bank in order to take care of Burton's checks drawn in favor of Workman. Under these circumstances it is difficult to understand why the Warrensburg bank did not at least become suspicious of these transactions and make some investigation to find out whether they were bona fide. In business transactions parties must not neglect to use their own judgment and discretion. [London v. Green, 49 Mo. 363; Hines v. Royce, 127 Mo. App. l. c. 723.] The court erred in ignoring this issue. [Younger v. Hoge, 211 Mo. 444; Martin v. Hill, 125 Mo. App. 375; Funding and Foundry Co. v. Heskett, 125 Mo. App. 516; Hines v. Royce, supra.]

The judgment is reversed and the cause remanded. All concur.

E. F. NEAL, Respondent, v. THE KANSAS CITY RAILWAYS CO., Appellant.

Kansas City Court of Appeals, May 20, 1918.

1. **TRIAL PRACTICE: Negligence: Continuance to Succeeding Term.** If a trial unfinished at the end of one term of a circuit court, is continued into the first day of a succeeding term of the same court, in the same county, and then proceeded with to the end of the trial, the proceedings in the latter term are invalid and the judgment rendered thereon should be reversed.

2. ———: **Jury: Discharge: Objection.** If a case on trial at the end of a term of the circuit court is continued into the succeeding term

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of the same court, in the same county, the prior term ended *ex vi termini legis*, and the jury is discharged from any further consideration of the case. And a defendant's objection at the succeeding term is timely.

3. ———: **Criminal or Civil Case: Distinction.** A circuit court at the close of one term cannot continue an unfinished trial into a succeeding term of the same court in the same county then to be proceeded with, and there is no distinction in this respect between a criminal and civil case.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird*, Judge.

REVERSED AND REMANDED.

Atwood, Wichersham, Hill & Popham for respondent.

Clyde Taylor and *Chas. A. Stratton* for appellant.

ELLISON, P. J.—Plaintiff's action is for personal injuries alleged to have been received by him through the negligence of the defendant. He recovered judgment in the trial court.

The question upon which we determine the case involves two succeeding terms of the circuit court for the same county, over which the trial judge presided; viz, the September and November terms, the latter term beginning on November 13, 1916. The trial was begun on the 8th of November, 1916, and progressed until Saturday, November 11th, the last day of the September term, when it was continued over to Monday following, which was the first day of the November term. The trial was then resumed against defendant's objection, and exception, resulting in the verdict for plaintiff.

The ground of defendant's objection is that the court could not continue an unfinished trial at one term into the next term, then to be taken up, where left off at the prior term and be proceeded with to the end. The point has been expressly decided by the Supreme Court in State v. Jeffors, 64 Mo. 376, 382, and State ex rel. v. Davis, 201 S. W. 529. In the latter case it was held that

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while a "circuit court in one county may adjourn to the date or beyond the date fixed for the next term in another county of the circuit," it cannot "adjourn to a time at or after which its own next term in the same county begins;" and that "the coming of one term of a court ends the preceding term of the same court." The same propositions were decided in Jaques v. Bridgeford Railroad Co., 43 Conn. 32, 34, and State v. Crilly, 69 Kansas, 802 811. In State v. Jeffors, supra, the Supreme Court said that when the suceeding term began the prior term "ended *ex vi termini legis*" and that upon a continuance of an unfinished trial at one term to be completed at a succeeding term, "the jury would be discharged from the bestowment of any further consideration of their verdict."

It is suggested that the foregoing rulings were made in criminal cases, and that is true; but the language used is not confined to such cases. And we can see no possible difference, in respect to the character of the terms and the power of the courts, between a criminal and civil case.

Finally plaintiff insists that as defendant took no exception to the action of the court continuing the unfinished trial into the next term, it has waived any objection thereto. In our opinion, if an exception was necessary to save the point, it was timely made when the defendant objected to proceeding with the trial when the case was called at the succeeding term.

A careful consideration of the briefs of counsel, together with one filed *amicus curiae*, has failed to show that the proceedings were regular or that the judgment has been lawfully rendered. It will therefore be reversed and the cause remanded. All concur.

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J. W. JOHNSON, Respondent, v. N. L. KASTER, Appellant.

Kansas City Court of Appeals, May 20, 1918.

1. **INSANE PERSONS: Allowance in Probate Court: Action in Circuit Court: Personal Judgment.** A person was declared insane in the probate court and placed under guardianship. He was afterwards restored to his right mind and the guardian discharged. While the guardianship was pending an account, accruing against him before his insanity, was allowed to a creditor against his estate by the probate court, but it was not paid. The creditor then brought suit on the judgment in the circuit court against the former insane person praying a personal judgment against him. It was *held* that the action could not be maintained.
2. **JUDGMENT IN REM: Personal: Estate.** An allowance in the probate court of a claim against an insane person accruing while he was sane is in the nature of a proceeding *in rem* to be considered a judgment against the estate and not personal against the ward afterwards restored.

Appeal from Schuyler Circuit Court.—*Hon. N. M. Pettingil, Judge.*

REVERSED.

Fogle & Fogle for respondent.

A. D. Morris and *J. M. Jayne* for appellant.

ELLISON, P. J.—John Sloop was the guardian of defendant, then an insane person. Plaintiff had a claim against defendant which accrued before the latter's insanity. This claim was exhibited to and allowed by the probate court. Afterwards defendant became restored and was duly declared to be sane by that court. Afterwards Sloop made final settlement and was discharged without paying the allowance. Thereafter plaintiff brought this action by petition in the circuit court on the judgment of allowance in the probate court wherein he alleges that defendant is personally liable for such judgment and whereby he seeks a personal judgment against

him as in an ordinary action on personal indebtedness. The trial court rendered judgment for plaintiff.

By special provision of the statute (Sec. 197, R. S. 1909) an action, in the first instance, may be had in the circuit court against an administrator to establish a demand against an estate; and when it is thus established, it must be exhibited as a demand in the probate court where it will be classified and paid wholly, or in part if there are not sufficient assets, just as any other allowed claim would be paid. There is no like provision in the statute of guardians for insane persons. [Secs. 474-533, R. S. 1909.] In view of the general statutory provisions concerning the mode of presentation and allowance of demands against estates of deceased persons, a creditor of an estate, but for the exception made by section 197, perhaps could not establish his demand in the circuit court, in the first instance. In St. Louis v. Hollrath, 175 Mo. 79, it was held that an action on a claim against the estate of insane person might be maintained in the circuit court, in the first instance, on a claim arising since the granting of letter of guardianship. But not so as to claims accruing before the guardianship. [Sec. 498, R. S. 1909.]

But if we should concede that an action on a claim like the present could have been maintained in the first instance in the circuit court, it would be a concession not aiding plaintiff. For he, in the first instance, did not go to the circuit court, but presented his claim in the probate court and had an allowance, or judgment for it by that court against defendant's estate, and this action is based on that judgment. By this action he proposes to take the case from the probate court, which has exclusive jurisdiction of it, and place it in the circuit court where he may obtain a judgment on a judgment of the probate court and thereby, in effect, enforce a judgment of the probate court by an execution from the circuit court.

We are of the opinion this cannot be done. Plaintiff should have proceeded to give effect to his allowance in the probate court, before Sloop made his final settlement and received his discharge. As just stated the probate court has exclusive jurisdiction in such matters (Chand-

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ler v. Dodson, 52 Mo. 128, 130), and if this particular creditor with an allowance in the probate court may sit by and permit a guardianship to be finally settled, depending on a supposed right to proceed in the circuit court against the ward who has been restored, every creditor could do the same and the distibution of estates be transferred to that court. We think it should not to be permitted. [Black v. Black, 34 Pa. St. 354.]

Plaintiff's case is nothing less than an attempt to make of the allowance in the probate court against the estate of an insane person a personal judgment against such person when restored to sanity. We think it can be done. [Brown v. Chadwick, 79 Mo. 587.] An allowance, or judgment, in the probate court, is of the nature of a judgment *in rem*, that is to say, it is against the estate (Moody v. Peyton, 135 Mo. 482, 491) and hence it is not a personal judgment against the ward.

The judgment will be reversed. All concur.

T. A. BERRYMAN, Respondent, v. MARYLAND MOTOR CAR INS. CO., Appellant.

Kansas City Court of Appeals, June 10, 1918.

1. **INSURANCE: Automobiles: Warranty: Temporary Violation: Materiality.** A statute (Secs. 7024, 7025, R. S. 1909) declared that a warranty in a policy of insurance which was not material to the risk, should be considered as merely a representation. A policy insuring an automobile against fire contained a warranty that the machine would not be hired out. It was hired out one or more times, but was not hired on the trip in which it burned. It was *held* that such violation of the warranty did not forfeit the policy and that the provision called a warranty was really not a warranty as applied to the loss and was therefore not material to the risk.

2. ———: **Temporary Violation: Forfeiture: Warranty.** Temporary violation of the provisions of a policy will not forfeit it, if there is no violation at the time of the loss; unless such provision is a warranty.

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Appeal from Jackson Circuit Court.—*Hon. William O. Thomas*, Judge.

AFFIRMED (*conditionally*).

Sebree, Conrad & Wendorff for respondent.

Ball & Ryland for appellant.

ELLISON, P. J.—Plaintiff's action is based on a policy of insurance whereby he was insured against loss by the burning of his automobile. He recovered judgment in the circuit court. The case was transferred to this court by the Supreme Court. [197 S. W. 850.]

Defendant's answer set up several defenses, among them was one that plaintiff, when he obtained the policy, fraudulently represented that the machine was made in 1911, when in fact it was made in 1908. That plaintiff warranted that he would not let the machine for hire, and afterwards violated the warranty and that he fraudulently represented to defendant that he had paid $1800 for the car when, in fact, he only paid $850 for it. The prayer to that division of the answer was that upon repayment of the premium collected from plaintiff, "the policy be adjudged null and void and a decree cancelling and annulling the same be entered and for such other and further relief as the court might deem proper."

On account of that defense and that prayer, defendant insists the case was converted into one in equity to be heard on the equity side of the court without a jury. While it is true that an answer setting up an equitable defense to a petitition declaring on a cause of action at law, may convert the case into one in equity, yet such answer must show a case entitling the defendant to affirmative relief necessary to sustaining or ascertaining his rights. [Plow Co. v. Hartman, 84 Mo. 610; Thompson v. Bank, 132 Mo. App. 225; Wolff v. Schaeffer, 4 Mo. App. 367; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 42; Shaffer v. Detie, 191 Mo. 377, 388.]

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In this case the policy was taken out the 25th of September, 1911, and expired by its own terms in one year, which was several months before defendant asked that the case be heard by the equity side of the court. There was no possible necessity for cancelling a policy which was dead paper and no longer effective, and could not involve defendant in further liability. Matter like this was discussed by us in Thompson v. Bank, supra.

Defendant cites us to Withers v. Railroad, 226 Mo. 373, but we think it not applicable to the facts of this case, on the contrary it is said in that opinion (page 396) to be recognized doctrine in this State that a case at law will not be converted into equity by answer, "unless affirmative relief is asked and is *necessary to ascertain or sustain the defendants rights.*" (Italics ours.)

We have already alluded to a warranty contained in the policy that plaintiff would not let the machine for hire without written permission from defendant. It seems that on one or two occasions this provision was violated. But at the time the machine was burned it was not hired. The law is that temporary non-compliance with provisions of the policy, unless such provision is a warranty, will not work a forfeiture, if there was compliance at the time of the loss. [Organ v. Ins. Co., 3 Mo. App. 576; Greenlief v. Ins. Co., 37 Mo. 25; Obermeyer v. Ins. Co., 43 Mo. 573; Kennefick-Hammond Co. v. Ins. Co., 119 Mo. App. 308; s. c., 205 Mo. 295.]

The provision now under review is called a warranty on its face, but if it is not a legal warranty in fact, it ought not to be so considered in law. The statute (Secs. 7024, 7025, R. S. 1909) has abolished warrenties and turned them into mere representations, except the matter warranted is material to the risk. Now in view of the legal proposition we have stated, the effect of this warranty was that if the machine was not in hire at the time it was burned there was no forfeiture and a liability was incurred. It follows that the thing warranted against was not material to the risk, thereby becoming, under the statute, a mere representation.

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There was evidence in the case tending to prove that the agent who procured the policy waived the warranty, in that during the progress of negotiations for the insurance he said to plaintiff that if he occasionally let the machine for hire no advantage would be taken of it by the company. Question is made as to that agent's authority to thus waive the warranty, and of the propriety of receiving such character of evidence showing what was verbally stated in order to affect the writing subsequently executed, it being a fundamental rule of evidence that all contemporaneous talk is merged in the writing. But we need not consider these objections, since, under the conclusion announced above, the warranty provision, has been made non-effective under the law as applied to the evidence showing the service the car was in when burned.

We regard defendant's point based on the age of the machine as unsubstantial. The evidence shows that that was a matter not definitely known and that the agent examined the machine and became satisfied for himself.

It is provided in section 7068, Revised Statutes 1909, that: "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent, on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." It has been ruled that in proper cases it is right to inflict these penalties. [Keller v. Ins. Co., 198 Mo. 461.] But, of course, there must be some substantial evidence upon which to base it. The evidence may be based on reasonable inferences drawn from the facts shown, as in other cases. These penal provisions do not necessarily follow a failure of the company's defense, for that would practically hinder and embarrass the right to defend at all. It must appear that the defense has not been made in good faith, but for the purpose of harrassing or vexing

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the claimant. [Blackwell v. Ins. Co., 80 Mo. App. 75; Weston v. Ins. Co., 191 Mo. App. 282; Lafont v. Ins. Co., 193 Mo. App. 543; Rogers v Ins. Co., 157 Mo. App. 671; Patterson v. Ins. Co., 174 Mo. App. 37; Strawbridge v. Ins. Co., 193 Mo. App. 687.]

In this case there is no evidence, direct or circumstantial, that defendant's refusal to pay an subsequent defense was not made from an honest opinion of the legal merit of plaintiff's claim. Indeed some of the questions appearing on the record have given us trouble to determine and we cannot bring ourselves to consent to penalizing defendant for defending against a claim that has barely passed muster.

The judgment will be affirmed if plaintiff within ten days will enter a remittitur of the penalty and attorneys fee; otherwise it will be reversed and the cause remanded. All concur.

H. H. BUTTERWORTH, Appellant, v. SAMUEL SOLTZ, Respondent.

Kansas City Court of Appeals, June 10, 1918.

1. **REPLEVIN: Automobiles: Repairs: Lien: Memorandum in Writing.** Under the statute (Sec. 1, page 327, Laws 1915) one who furnishes material and does repairs on an automobile cannot have a lien therefor, unless a memorandum of the work and material be made in writing and signed by the owner.

2. **———: Statutes: Common Law Right.** The statute is a qualification and restraint upon the Artizans common law right to a lien.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain,* Judge.

AFFIRMED.

George W. Barnett and *E. C. White* for appellant.

W. D. Steele for respondent.

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ELLISON, P. J.—Plaintiff's action is replevin for an automobile. The trial court sustained a demurrer to the evidence submitted by plaintiff and rendered judgment for defendant.

The evidence in plaintiff's behalf tended to show that defendant placed his automobile in plaintiff's possession with the verbal request that he furnish the material and make certain repairs thereon. That plaintiff complied with such request and claimed an artizans lien for his bill amounting to thirty-five dollars. That defendant obtained possession of the automobile without paying the bill and this action followed.

It will be observed that plaintiff furnished the material and did the repairing on defendant's verbal request. The case involves the construction of section 1, of the lien law found in the Session Acts of 1915, page 327, reading as follows; "Every person who shall keep or store any vehicle, part or equipment thereof, shall, for the amount due therefor, have a lien; and every person who furnishes labor or material on any vehicle, part or equipment thereof, who shall obtain a written memorandum of the work or material furnished, or to be furnished, signed by the owner of such vehicle; part or equipment thereof, shall have a lien for the amount of such work or material as is ordered or stated in such written memorandum. Such lien shall be on such vehicle, part or equipment thereof, as shall be kept or stored, or be placed in the possession of the person furnishing the labor or material."

The lien given by this section is for labor and material which may be ordered by the owner in writing.

Before the artizan is entitled to lien for which he may retain possession of an automobile, he must obtain from the owner a written memorandum of the work and material furnished, or to be furnished. As there was no writing shown, there can be no lien, unless plaintiff is entitled to maintain one without regard to the statute. And he makes claim in the present instance under the common law, by which an artizan has had a right to a lien (Kirt-

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ley v. Morris, 43 Mo. App. 144) without a written contract.

It is true that a statutory right nor a statutory remedy does not necessarily oust a common-law right and remedy for the same thing. But when it is manifest from the face of a statute that it is intended to cover the entire ground, it becomes exclusive. [Wyckoff v. Southern Hotel, 24 Mo. App. 382.] Now this statute gives a lien to every artizen who shall obtain a *written* memorandum of the work and material, signed by the owner. Unless intended to supercede the common law, it is utterly useless enactment, since he had a lien at common law for a written order. It is apparent that the statute is in restraint, or qualification of the common-law lien, in that it must be founded upon the owners written order. If it does not supercede the common law in this respect, it can never be enforced, as it would never be needed; for a violation of the statute would be obedience to the common law.

We think the view of the trial court was right and hence affirm the judgment. All concur.

CLARA W. MOULDEN, Respondent, v. DORA E. TRAIN, et al., Appellants.

Kansas City Court of Appeals, June 10, 1918.

1. **TRUST: Express: Limitations: Disavowal.** The Statute of Limitations does not run against an express trust unless the trust be openly disavowed.

2. **PERSONAL PROPERTY: Parol Evidence.** An express trust may be had in personal property without a writing, and may be established by parol; though if the subject of the trust is real estate, to satisfy the Statute of Frauds it must be in writing.

3. **TRUSTS: Particular Words to Establish: Admission.** It is not necessary to use any particular words to establish an express trust, such as "trust" or "trustee." Nor is it necessary that the admission of the trusteeship be addressed to any particular person.

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4. **CONSENT: Fiduciary Relation: Possession: Discharge.** When a person assumes, with or without consent, to act as trustee of money, that is, to act in a fiduciary relation with regard to it, and has in consequence been in possession of it, he is trustee of an express trust and cannot discharge himself except by accounting to the *cestui que trust*, without regard to the lapse of time.

5. **DIVIDENDS: Trustee: Statute of Limitations.** A defendant held in his hands a sum of money arising from dividends on certain stock which came into his possession as money belonging to the plaintiff or another. He acknowledged that he held the money for whoever was entitled to it. It was *held* that he was an express trustee and that the Statute of Limitations did not run against the claim against him.

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney,* Judge.

AFFIRMED.

Ashley & Gilbert for respondent.

O. E. Robinson for appellants.

ELLISON, P. J.—Plaintiff began this action on the 30th of December, 1915, for dividends received to her use by said H. D. Train on 15000 shares of the capital stock of Logan Oil and Gas Company, represented by stock certificate No. 88 issued by the Logan Oil and Gas Company an Arizona corporation to Charles A. Allen and by him transferred, for value received, to plaintiff by his written assignment.

The defense is the five year period of limitation. The evidence to sustain the action consisted largely of a letter from Train dated the 14th of December, 1910. It is claimed that limitation began to run in Train's favor, at least, from the date of the letter, and that being more than five years from the beginning of the action, it is barred.

Among other points made by plaintiff in one that Train held the money as as express trustee. If he did, the Statute of Limitations cannot be invoked for it does not run against an express trust until it is openly dis-

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avowed. [Koyl v. Lay, 194 Mo. App. 291, 297; St. Pauls Crurch v. Attorney General, 164 Mass. 188, 200; 2 Perry on Trusts, sec. 863; 2 Wood on Limitations sec. 200.] Ordinarily such trusts concern real estate and must be in writing to satisfy the Statute of Frauds, but an express trust may exist as to personal property, and may be shown by parol, as well as by writing. [1 Perry on Trusts, sec. 86.] It happens to be evidenced by a letter in the present instance. The letter is a direct admission that Train was, and had been, holding for the owner, six hundred dollars arising out of dividends of certain stock and that he was willing to pay it over to the owner and requested that such owner be made known to him. The terms of the letter undoubtedly made Train the trustee of an express trust. "There is no particular formality required or necessary in the creation of a trust." Nor is it necessary to use any specific words such as "trust" or "trustee." Nor that the admission of trusteeship be addressed to the *cestui que trust*. [1 Perry on Trusts, sec. 82.]

In Soar v. Ashwell, 2 Q. B. Div. (1893) 390, 394, it was said that the cases decided "that where a person has assumed, either with or without consent, to act as a trustee of money or other property, i. e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a court of equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui que trust* for all such money or property without regard to lapse of time." There were several concurring opinions in that case. BOWEN, L. J. said at page 397 of the report, "that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a contructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is

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coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: Chalmer v. Bradley (7); Marquis of Cholmondeley v. Lord Clinton (8); and this confidence or trust imposes on him the liability of an express or direct trustee." Further along, quoting from another case, is this, "I do not hesitate to say" says GIFFARD, L. J., "that when the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time." Again, quoting from another case, it is said that, "Where money has found its way into the hands of a trustee or other person against whom this court gives the same relief as against a trustee, there the trustee, or the *person in a fiduciary position,* cannot set up the Statute of Limitations as an answer to the demand for money which was in his hands." (Italics not ours).

In St. Pauls Church v. Attorney General, 164 Mass. l. c. 200, it is said that "Where the possession of property is held by a trustee not by virtue of any personal right or personally asserted right on his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the *cestui que trust* is of very little importance, but the relationship is all important; and, so long as the relation of trust exists, it is a case of express trust, no matter who the *cestui que trust* may prove to be. . . . In the case at bar, it is true that the only duty of the plaintiff's from the start was to pay over one-half of the trust fund to David Sears; yet by their continued acknowledgment of an existing trust relation, and by making no assertion of any adverse claim, they induced a reliance on the existance of the fiduciary relation by virtue of which they expressly held the property."

Referring to defendant's point that there was no showing that plaintiff was the owner of the money, we think there was ample evidence to justify the finding that she was.

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In consideration of the foregoing it is clear that the statute did not run against the claim and that the trial court took the proper view of the law and the judgment will be affirmed. All concur.

WESTERN WHEEL SCRAPER CO., Respondent, v. JOHN SPITCAUFSKY, Appellant.

Kansas City Court of Appeals, June 10, 1918.

CONTRACTS: Promise "When Able:" Validity: Burden of Proof. A promise to pay for property purchased "when able" is a valid contract and can only be enforced when the promisor has become able; and the burden is on the promisee to prove that fact.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn,* Judge.

REVERSED AND REMANDED.

S. A. Dew for respondent.

Gage, Ladd & Small for appellant.

ELLISON, P. J.—Plaintiff's action is based on defendant's contract to pay it nine hundred dollars, alleged to be the purchase price of certain "steel dump cars." The judgment in the trial court was for plaintiff for that amount.

It appears that a corporation, of which defendant was one of the principal members, had rented the cars with an agreement of some kind for purchase, at least the corporation seems to have had possession of the cars when it became embarrassed to the extent of bankruptcy. It seems to be conceded that nothing was consummated with the corporation and that the contract of sale upon which this action is based was made by plaintiff's agent with defendant personally.

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The evidence showed that defendant's agreement to pay was somewhat out of the ordinary character of promise. According to the testimony of plaintiff's agent who made the sale, it was apparent that defendant could not pay cash, and so the terms of sale were, that he was to pay "when he earned it"—That "he was to pay for them when he was able." Plaintiff proved the promise, and then stopped short, without showing the condition had been fulfilled by defendant's having become able. We think he thereby failed to establish his case. [Work v. Beach, 22 N. Y. S. 12, 16; Veasey v. Reeves, 6 Ind. 406; Barnett v. Bullett, 11 Ind. 310; Eckler v. Galbreath, 75 Ky. 71; Mattocks v. Chadwick, 71 Maine, 313; Hallady v. Weeks, 127 Mich. 363; Baker v. Heath, 74 N. H. 270; Cook v. Weeks, 7 Hill 45; Scott v. Thornton, 104 Tenn. 547, 551; Tebo v. Robinson, 100 N. Y. 27.]

In the first of these cases the court said that, "By taking a conditional obligation, the condition itself being founded upon a valuable consideration, the obligee accepts the burden imposed upon him of establishing fulfillment of the condition before he can recover."

In the last case will be found some observations as to what would be considered ability to pay, but that is not a question in the present record.

There is a class of cases involving promissory notes, particularly those which are negotiable, in which certainty, or uncertainty, in the terms of the promise is of importance in determining whether the contract fills the definition of a note. But the present case is not embarrassed by considerations of that character.

Plaintiff has endeavored to show that the agent in testifying to the terms of the contract, did not mean what we have stated he said. But we have no doubt as to that. He was asked plainly for the terms and he stated explicitly, and repeated, what they were. Furthermore, there was nothing inconsistent in his statement of those terms with other parts of his testimony.

The judgment will be reversed and the cause remanded. All concur.

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RAYMUTH REAL ESTATE & BUILDING COMPANY, a corporation, Appellant, v. C. J. ROBINSON, Admr., cum testamento annexo of the estate of SYLVESTER J. FISHER, deceased, Respondent.

St. Louis Court of Appeals. Argued and Submitted May 8, 1918. Opinion Filed June 4, 1918.

1. **EXECUTORS AND ADMINISTRATORS: Claims Against Estates: Priority: Collections by Agent: Trust Fund: Equity.** In a suit in equity, by which it is attempted to charge the assets of the estate of a real estate agent, deceased, in the hands of his administrator, with a special lien against those assets, on the claim that moneys collected by such agent in his lifetime, as rentals of the property of plaintiff, went to swell and increase his assets during his lifetime, and had passed into the possession and control of his administrator, where it affirmatively appears that none of this money passed to the administrator, and that all of the money that he had was derived from the sale of real estate and personal property, and even that was realized from the sale of the equities of deceased in these properties; *held* that there is an entire lack of any evidence that the money, rentals of plaintiff collected by deceased, went to the benefit of or swelled the estate to the amount of the trust property or its proceeds, much less that any of it ever came into the hands of the administrator.

2. ———: ———: **General Claim.** There is no statute in Missouri that provides for "a general claim," no such term being used in the classification of demands against an estate.

3. **COURTS: Circuit and Probate Courts: Suit Against Administrator: Certification of Claims.** Furthermore, there is no rule of practice, or statute in Missouri, by which, in such case, on the failure of the claimant to establish his demand as a preferred claim, it is within the power of the circuit court to order it certified to the probate court for allowance.

4. **APPELLATE PRACTICE: Trial Practice: Theory of Case in Trial Court.** The appellate court will not remand the cause with directions to enter the claim against the estate, when no such point was made in the trial court, and such an order is resisted by the administrator.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. William M. Kinsey*,. Judge.

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AFFIRMED.

Thomas S. McPheeters for appellant.

(1) Where trust funds are wrongfully commingled and converted by the trustee and the general assets of the trustee are thereby benefited, equity will charge those assets with the amount of the converted fund as a preferred demand. Harrison v. Smith, 83 Mo. 210; Stoller v. Coates, 88 Mo. 514; Evangelical Synod v. Schoeneich, Admr., 143 Mo. 652. (2) While the mere receipt and conversion to his own use of trust funds by an insolvent trustee will not entitle the owner of the fund to a prior lien, if it appears that the insolvent's estate in the hands of the administrator or assignee has been enriched or benefited by the use of the trust funds, then a prior lien to that extent should be declared. Evangelical Synod v. Schoeneich, Admr., 143 Mo. 652; Pundmann v. Schoeneich, Admr., 144 Mo. 149; In re Assignment v. Zumbalen, 85 Mo. 671, 674; Bircher v. Walther, 163 Mo. 461; Pearson v. Haydel, 90 Mo. App. 253. (3) If it appears that the trust funds were not lost, destroyed or wasted, but were used by the trustee in his business, in paying his debts and in protecting his property, from these facts equity will presume that the insolvent's estate was benefited thereby and a prior lien should be declared. Evangelical Synod v. Schoeneich, Admr., 143 Mo. 652; Pundmann v. Schoeneich, Admr., 144 Mo. 149; In re Assignment v. Zumbalen, 85 Mo. App. 671, 674; Bircher v. Walther, 163 Mo. 461; Pearson v. Haydel, 90 Mo. App. 253.

John M. Wood for respondent.

(1) As it does not appear from the evidence that the money of plaintiff or any part thereof, or the proceeds thereof, was in the estate or belonged to the estate of said Fisher, at the time of his death, or has been received by the defendant as administrator, the plaintiff is not entitled to have a lien on the assets of the estate

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superior to that of the other creditors, or to have its claim preferred over the claims of other creditors. Bircher v. Walther, 163 Mo. 461; Pearson v. Haydell, 90 Mo. App. 253.

REYNOLDS, P. J.—This is a suit in equity, by which it is attempted to charge the assets of the estate of Sylvester J. Fisher, deceased, in the hands of his administrator, with a special lien against those assets, on the claim that moneys collected by Fisher in his lifetime, as rentals on the property of plaintiff, went to swell and increase the assets of Fisher during his lifetime, and had passed into the possession and control of defendant as administrator, and "are now in the possession and control of said administrator and so mingled with the funds, property and assets of said Fisher in his hands that it is not possible to separate, identify or distinguish plaintiff's funds in his possession, or that said funds of plaintiff were paid out by said Fisher during his lifetime in the course of his business and used in paying his debts and obligations of various kinds, thereby enhancing the value of the estate received by this defendant as administrator and plaintiff declares that it believes that either said funds of plaintiff as aforesaid actually passed into the hands of said administrator as aforesaid, or that said funds of plaintiff were paid out by said Fisher during his lifetime as aforesaid, but this plaintiff is not informed as to which of said alternatives is true," and that the estate of Fisher is insolvent and that there are large claims, exceeding its assets, against it.

The cause was tried before the court as in equity.

At the trial of the cause the defendant administrator, being sworn as a witness in behalf of plaintiff, plaintiff offered and read in evidence the answer of defendant, as also a former answer, but that is not in the abstract.

Counsel, after stating the formal averments of the petition as to incorporation of plaintiff and appointment of defendant, and that he is now in charge of the

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estate, having taken possession of the assets, real and personal, owned by Fisher at the time of his death, and that up to the time of his death he was engaged in the business of a real estate agent, under the name of Fisher & Company, and as such was in charge of the apartment building mentioned, collecting rentals thereon and accounting to plaintiff and remitting them monthly to plaintiff, and that at the time of his death was in possession of $1056.66, representing rentals belonging to plaintiff, and that he had mingled these funds with his own and other funds, so that they cannot be now distinguished, summarized the testimony of the administrator, to the effect that he is such administractor and had taken charge of such assets as he could find and sold and converted them into cash; that in his last annual settlement, filed just a week previous to the trial, that is, about March 28, 1915, more than three years after the death of said Fisher, he had on hand in cash the sum of $8187.89; that in addition he held 193 shares of the stock of Fisher & Company Real Estate Company, a corporation, which he thought ought to be worth about $100 a share. The witness testified that Fisher carried on his real estate business under the name of Fisher & Company, and that he had a separate corporation, a holding company, called the Fisher & Company Real Estate Company, in which, as stated, he held 193 shares of stock of the par value of $100 per share, and the corporation was capitalized for $20,000.

He futher testified that claims had been allowed against the estate up to October 16, 1913, amounting to $65,660.98; that of these claims there was only one first-class claim, which was for funeral expenses, amounting to $705, and that there was only one second-class claim for medical services, amounting to $184, and that there were no claims of the third and fourth class, but that all the claims allowed. except the two mentioned, were of the fifth and sixth class.

He testified further that there were no suits pending in which a similar claim for preference was made.

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He further testified that no cash came into his hands as administrator and that he took over nothing but real property and personal property other than cash.

On cross-examination defendant testified that he had received no money out of the safe or from the National Bank of Commerce, representing money collected for the account of Fisher, himself, or any of Fisher's clients. Practically all of the general or fifth and sixth class claims allowed against the estate were similar to plaintiff's, that is to say, rents collected by Fisher and deposited and mixed with his personal funds.

He further testified that a judgment was secured by Joseph Wright executor of one Susie M. Rodgers, for $13,000, including interest and costs, and that judgment was against Fisher personally and against the Fisher & Company Real Estate Company, a corporation; that it was a reference case and the case was pending in court on the exceptions to the referee's report at the time of Fisher's death and culminated in judgment after his death. That between January 3rd and January 20th, Fisher collected for plaintiff, on account of rents, the sum of $1056.66, and that amount was placed in Fisher's safe or deposited in the Bank of Commerce or both, and mingled with Fisher's personal funds and the funds of other clients; that during January, 1912, and for many years prior to his death, clients of Fisher were paid by him either in cash taken out of the funds so mixed and deposited in the safe, or by check against the funds so mixed and deposited in his bank accounts; and a part of the personal expenses of Fisher were also paid out of these funds in the same way. That on January 1, 1912, Fisher had in his safe the sum of $130.90, and in bank $574.95, being his own money, in addition to cash in the safe and on deposit belonging to clients; that during the month of January, prior to his death, Fisher, in addition, collected for his personal account and mingled with his clients' funds the further sum of $561.11; that during the same month he collected for his clients alone $30,003.86, $4651 of which amount was collected between January 20th and 23rd.

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Whereupon counsel for plaintiff stated that to save time he would admit that all of the allegations in the answer as regards the amounts collected or paid out or mingled were correct, including the source from which the money came, and the dates.

Witness Robinson, continuing, testified that the value of the stock of the Fisher & Company Real Estate Company, which he held amounted to about $16,000, and was in the form of cash; that the corporation was a defendant in the suit brought by Wright, executor of Susie M. Rodgers, in which case judgment for $13,000 was recovered; that it was also a defendant in the McCausland Case, which was for about $30,000, pending before a referee; that the McCausland Case did not proceed against Fisher as an individual or against his estate.

The above and foregoing, together with the answer, was all the evidence introduced or heard in the trial of the cause.

The answer, in substance, admitted that Sylvester J. Fisher died January 23, 1912, testate; that by the course of dealings between plaintiff and Fisher, the latter would collect rental from the building and remit to plaintiff, after deducting his commission of one and a half per cent. as such agent. It is also admitted that it was the practice of Fisher in his lifetime, as hereafter more fully set forth, to mingle with his individual funds and trust funds collected for numerous other patrons, the rentals collected for plaintiff. It is further admitted that the estate of Fisher is insolvent and that the claims that have been allowed against the estate aggregate a sum many times larger than the assets of the estate. Further answering, however, the defendant denies that the money mentioned in the petition as having been collected and received by Fisher for plaintiff, or any part thereof, has been received, or came into the hands of defendant since his appointment as administrator, and defendant denies that the moneys of plaintiff and of other customers of Fisher and his personal funds which were mingled and mixed in said depositories, or any part thereof had been received by defendant since his appointment as adminis-

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trator of the estate, defendant averring that the only moneys he had received as such administrator had been derived from collections made for the estate and from the sale of property belonging to the estate; and that at the time of the death of Fisher, he had no money whatever on hand. Further answering, denying all the averments in the petition, except as above admitted, defendant states that Fisher, at the time of his death and for several years prior thereto, was insolvent; that during the month of January, 1912, preceding his death, and for many years immediately preceding his death, Fisher, in the conduct of his business as real estate and loan agent, continuously mixed and mingled with his personal funds moneys collected and received by him for his patrons and held in trust for them, including collections made for plaintiff; that Fisher, during several years immediately preceding his death, deposited a part of the funds of his patrons and of himself, so mixed and mingled together in an iron safe kept in his office, and the remainder in the National Bank of Commerce of the city of St. Louis, to his personal credit, under the name of Fisher & Company, which was the name under which he usually did business; that on and between the 3rd and 20th days of January, 1912, Fisher collected for plaintiff, on account of rents for the apartment houses, the sum of $1056.66, which, less his commission of one and a half per cent., or $15.85, was the total indebtedness of Fisher to plaintiff at the time of his death; that this amount was deposited in the safe or bank, or both, and mingled with the personal funds of Fisher, if any he had, and with the funds of other patrons of Fisher in such safe and bank; that during the month of January, 1912, prior to his death and for many years prior to his death, the patrons aforesaid of Fisher, for whom collections were made and deposited, as above stated, either in the safe or in the bank, or in both, were paid by Fisher either in cash taken out of the funds so mixed or deposited in the safe, or by check against the funds so mixed and deposited in the name of Fisher & Company in the bank; that part of the personal expenses of Fisher were also paid out of these funds.

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in the same way; that on the first day of January, 1912, there was of said amount so deposited in the safe in the office of Fisher, a balance of $130.90; that at the last mentioned date there was of the fund in the bank to the credit of Fisher, under the name of Fisher & Company, the sum of $574.95; that during the month of January, 1912, and prior to his death, Fisher collected for his personal account and mingled with the funds of his patrons and deposited in the manner aforesaid, the sum of $561; that during the month of January, 1912 and prior to his death, Fisher collected and deposited in the depositories mentioned, moneys belonging to his patrons in the sum of $30,003.86—$4651.93 of which amount was deposited on and between January 20 and 23, 1912; that during the month of January, 1912, and prior to the 20th day of that month, Fisher paid out of the funds above mentioned, which had been deposited in the safe and bank, in discharge of his personal indebtedness, the sum of $2356; that this amount was made up of the following items and for the amounts after each, namely:

For salaries of employes,.....	$843.85
For board of himself and family and other incidental expenses,.....	711.16
For nurse for himself,.....	110.00
For maturing interest on personal indebtedness, ...	512.30
For advertising property for sale and rent in a newspaper,.....	100.00
For premiums on life insurance policies in favor of his wife,.....	55.25

That on and between January 20 and 23, 1912, Fisher paid out of the fund so deposited in the safe and in the bank, for his personal expenses, the further sum of $52; that during the month of January, 1912, and prior to his death, Fisher paid out to his patrons, whose money he had collected and deposited in the safe and bank above mentioned, the sum of $25,535.86; that on the day of his death, to-wit, January 23, 1912, Fisher gave to one Lassen a check for $3400.87, drawn on the mixed fund deposited

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in bank, the proceeds of the check to be applied to paying patrons for whom Fisher had collected money and deposited and mingled the same with that of his own and of other patrons, in the National Bank of Commerce, as before stated; that while at the time the check was made, Fisher and Lassen supposed there was a balance of $3400.87 in the account at the bank, to the credit of Fisher & Company, after allowing for the payment of all outstanding checks theretofore issued against the same, there was in fact outstanding unpaid checks aggregating $436.39, issued against the account by Fisher, in January, 1912, and in favor of his patrons whose money he had received and deposited in said account in said bank; that this check for $3400.87 accordingly overdrew the account to the extent of $436.39; that out of the proceeds of the check for $3400.87, Lassen, on January 23, 1912, prior to the death of Fisher, paid to the patrons of Fisher, whose moneys had been deposited by Fisher in the bank, the sum of $2104.06, and subsequently paid out of said proceeds the overdrafts or unpaid checks aggregating $436.39, and applied the balance of the proceeds of the check for $3400.87 to the payment of other patrons of Fisher, whose moneys Fisher had theretofore deposited in the bank in the account with funds of his other patrons and with his personal funds; that all of which facts in reference to the money that Fisher had on hand on the first day of January, 1912, and in respect to moneys collected and received by him for his own account, and the disbursements of the moneys more fully appear by reference to an itemized statement filed with the answer. It is further set out in the answer that Lassen died in September 10, 1914; that at the time he had received the check for $3400.87, he was insolvent and continued to be insolvent up to the time of his death. Defendant further sets up that the larger part of the demands allowed against the estate of Fisher arose out of moneys collected or received by Fisher from his patrons and which he had mixed and mingled with his own and the moneys of other patrons in the depositories before men-

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tioned and had paid out in the discharge of his personal expenses and on account of money due other patrons, whose money he had received and deposited in the depositories. Defendant further states that the rentals collected by Fisher for plaintiff in nowise swelled or increased the assets of Fisher. The answer concludes with a denial of any claim of plaintiff to the lien or preference as claimed in the petition, and avers that plaintiff is not, in equity, entitled to have this claim preferred above the claims of the other creditors of the estate.

There is a reply to this, and on the conclusion of the trial the court dismissed the bill. Filing a motion for new trial and excepting to its overruling, plaintiff has duly appealed.

Appellant assigns for error the action of the court in dismissing plaintiff's bill and in not entering a decree in favor of plaintiff, and in not ordering plaintiff's claim to me preferred above the claims of general creditors of Fisher's estate, and in dismissing plaintiff's bill without even decreeing a judgment in favor of plaintiff for the amount sued for and admitted by the defendant to be due.

We have concluded, on an examination of the authorities, that the action of the trial court in dismissing the bill is in accordance with the holding of our Supreme Court in Bircher v. Walther et al., 163 Mo. 461. 63 S. W. 691, and that of our court in Pearson v. Haydel, 90 Mo. App. 253; and Hunter v. Mathewson, 149 Mo. App. 601, 129 S. W. 749.

In the Bircher Case, which went to the Supreme Court from our Court, as see Bircher v. St. Louis Sheet Metal Ornament Co., 77 Mo. App. 509, it is said by our Supreme Court that in the case of Paul v. Draper, 158 Mo. 197, 59 S. W. 77, the court had occasion to examine all the Missouri cases on the main question in hand (which was as to the right of plaintiff to a preference out of the assets in the hands of an assignee), and while in Paul v. Draper, it did not become necessary to formu-

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late the rule to be deduced, not from dicta, but from the rulings of the appellate courts of this State on the facts in judgment in those cases, that it is well to state the rule in the case then before the court. The court then stated the rule as follows, quoting the syllabus:

"If trust property has been mingled by a company with its own property, so that the one cannot be distinguished from the other, and it transfers its property to a trustee or assignee for the benefit of its creditors, a court of equity, as between the *cestui que trust* and the personal creditors of the company making the assignment, will follow the trust property or its proceeds, and if the same can be traced into the property or assets transferred to the trustee or assignee, will impress on such property or assets a lien in favor of the *cestui que trust* to the extent that the property or assets transferred have been swelled by the trust property or its proceeds. But, if there is no evidence that the trust property, or its proceeds, went to swell the company's assets transferred to the assignee for the benefit of creditors, but on the contrary was paid out on the debts of the company and for its current expenses, this rule cannot be invoked, and a court of equity ought not to decree the claim of the *cestui que trust* to be a preferred claim over that of other creditors."

This is a fair synopsis of the opinion, which is an elaborate discussion of the rule and the principle upon which it rests.

Learned counsel for appellant challenges the deduction drawn from this Bircher Case and claims that it is inconsistent with what was said by our Supreme Court in Harrison v. Smith, 83 Mo. 210; Stoller et al. v. Coates, 88 Mo. 514; Evangelical Synod of North America v. Schoeneich, 143 Mo. 652, 45 S. W. 647; and Pundman et al. v. Schoenich, 144 Mo. 149, 45 S. W. 1112. It is true that the Supreme Court, in the Bircher Case, did not refer to these cases, and that what is there, as also in Paul v. Draper, held, is not in line with those and earlier cases, but the Supreme Court had before it the opinions of our

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court in that case; that it did not notice them by name is immaterial, for in Pearson v. Haydel, 90 Mo. App. 253, l. c. 265, Paul v. Draper, supra, and Bircher v. Walther et al., supra, set out the law "as declared in the latest decisions of our Supreme Court and must control the determination of the present controversy adversely to the prayer of the petition as to the decedent's general estate." See also as germane to the main point here involved and in line with the Paul and Bircher Cases, Midland National Bank of Kansas v. Brightwell, 148 Mo. 358, 49 S. W. 994.

Our court in Pearson v. Haydel, above referred to, did, however, examine not only all the cases cited by counsel for appellant from our own courts, but those of other jurisdictions, and in conclusion followed the Bircher decision, specifically holding that the rule in equity requires the trust fund or its proceeds to be mixed with the mass of the insolvent's estate in the hands of his assignee, trustee, or other representative, in order for a preferential lien to be declared, and holds that the fact that it was at one time wrongfully mingled with it, is insufficient to authorize a preference. We cannot improve upon, and it is unnecessary to enlarge upon, what is there so well said by Judge GOODE, and we refer to that decision as here conclusive.

In Hunter v. Mathewson, supra, Judge GOODE, speaking for our court and discussing the rule here applicable very fully, held that the trial court evidently had in mind the doctrine that the owner of a fund may follow it into the hands of an assignee for creditors and secure a lien on the assigned assets if he can show his money passed to the assignee, citing Paul v. Draper, supra. But, said Judge GOODE, that doctrine is not applicable when it is clear that no money belonging to the plaintiff came into the hands of the assignee.

In the case at bar, it affirmatively appears that none of this money passed to the administrator in this case. All the money that he had was derived from the sale of real estate and personal property, and even that was real

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ized from the sale of the equities of Fisher in these properties. So that there is here an entire lack of any evidence that the money, rentals of the plaintiff collected by Fisher, went to the benefit of or swelled the estate to the amount of the trust property or its proceeds, much less than any of it ever came into the hands of the administrator. Nor were the moneys that were in the hands of Fisher and which he had paid out before his death, exclusively moneys derived from the rentals of this plaintiff. They amounted to a large sum and were moneys received and collected by Fisher from a multitude of his patrons, of which the amount that he collected as rentals from plaintiff's property was comparatively small in proportion.

It is said, however, by learned counsel for appellant that if plaintiff is not entitled to a lien for the full amount of his claim, it should, at least, be entitled to a lien to the extent of $513.30, the amount used by Fisher, as it is said, in the payment of his mortgage indebtedness. The trouble with this contention is, there is no evidence in the case to sustain this proposition. All that the evidence shows as to this is that that amount of money was paid out by Fisher on his personal account, but it does not appear by the evidence in the case for what purpose or on what account it was paid out.

It is further claimed by learned counsel for appellant that the trial court should have allowed plaintiff's demand "as a general claim," and certified it to the Probate Court as such. We are not aware of any statute of our State that provides for what counsel calls "a general claim," no such term being used in the classification of demands against an estate. Furthermore, we are aware of no rule of practice, or statute, by which, in a case such as this, on the failure of the claimant to establish his demand as a preferred claim, it is within the power of the circuit court to order it certified to the Probate Court for allowance. Finally, and conclusively on this proposition, no such point was made in the trial court. It is true that in Pearson v. Haydel, supra, our

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court remanded the cause with directions to enter judgment for the amount against the estate, but that was done, as stated, on stipulation of the parties. Here we have no such stipulation and respondent objects.

The judgment of the circuit court should be and it is affirmed. *Allen* and *Becker, JJ.*, concur.

MARY E. HOLMES, Respondent, v. PROTECTED HOME CIRCLE, a corporation, Appellant.

St. Louis Court of Appeals. Submitted on Briefs May 8, 1918. Opinion Filed June 4, 1918.

1. **INSURANCE: Fraternal Benefit Insurance: Cause of Death: Question for the Jury.** Where the testimony in the case as to the cause of insured's death was conflicting, and there being substantial evidence to sustain the theory of plaintiff, that made it a case for the jury.
2. **APPELLATE PRACTICE: Verdict of Jury: Conclusive on Appeal.** The findings of a jury as to the cause of death of insured based on conflicting evidence is conclusive on the appellate court.
3. **INSURANCE: Fraternal Benefit Insurance: Proofs of Death: Cause of Death: Statements of Physician not Conclusive.** Where there was a conflict between the statement in the proofs of death made by the beneficiary and that made by the physician, it could not be said that filing the certificate of the physician constitutes such an admission against interest as to be conclusive upon plaintiff in the action.
4. **INSTRUCTIONS: Defining Terms: Burden.** Using the word "burden" in an instruction, undefined, is not reversible error, such word being a plain, common, word, easily understood by any one fit to sit on a jury.
5. ———: **Jury: Not to Speculate or Guess: Evidence.** Telling the jury in an instruction that in determining whether insured died from excessive use of morphine, they are not to speculate or guess, is not error.
6. ———: **Cause of Death: Evidence.** An instruction that told the jury plaintiff was entitled to a verdict unless the jury found and believed from the evidence that insured came to his death from the excessive use of morphine, presented the issue fairly, clearly, and intelligently.

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Appeal from the Circuit Court of the City of St. Louis. —*Hon. Wilson A. Taylor,* Judge.

AFFIRMED.

R. P. & C. B. Williams for appellant.

Hon. A. W. Williams Of Counsel.

(1) It was misleading, prejudicial and erroneous to tell the jury, as was done in instruction No. 1, that in determining whether or not the assured's death was caused by the excessive use of morphine, the jury should not speculate or guess. Pepperkorn v. St. Louis Transfer Co., 171 Mo. App. 709, 154 S. W. 836; State ex rel. v. Ellison, 187 S. W. (Mo.) 23. (2) It was error to tell the jury that the burden of proof was on the defendant as to the issues raised by the answer, without defining the term "burden of proof." Walsh v. Insurance Co., 162 Mo. App. 546; Miller v. Elder, 160 Mo. App. 399; Prince v. Compress Co., 112 Mo. App. 49; Clarke v. Kitchen, 52 Mo. 317. (3) Defendant's demurrer to the evidence at the close of the whole case should have been sustained, because of the admission of the beneficiary in the proofs of death that the assured came to his death from the excessive use of morphine. Such manner of death avoided the certificate under the contract and by-laws of the defendant. Castens v. Supreme Lodge Knights and Ladies of Honor, 190 Mo. App. 57; Stephens v. Metropolitan Life Insurance Co., 190 Mo. App. 679. (4) When the beneficiary sends in to the home office proofs of death which have attached thereto an affidavit or statement of the attending physician as to the cause of the death, this is binding on the beneficiary as an admission and precludes recovery. Castens v. Supreme Lodge Knights and Ladies of Honor, 190 Mo. App. 57; Stephens v. Metropolitian Life Insurance Co., 190 Mo. App. 679. (5) Instruction No. 2 was erroneous because it in effect told the jury that they could not find

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for the defendant unless they believed that the death of the assured was caused solely by the excessive use of morphine, and this was not cured by defendant's instructions correctly defining the law. Redpath v. Lawrence, 42 Mo. App. 102; Bludom v. Ry. Co., 108 Mo. App. 437; Standard Oil v. Meyers, 74 Mo. App. 447; Walker v. White, 192 Mo. App. 13; Hall v. Coal Co., 260 Mo. 351; Traylor v. White, 185 Mo. App. 325; Ghio v. Schaper Bros., 180 Mo. App. 6; Wojtylak v. Kansas, 188 Mo. 260.

William J. Jones for respondent.

(1) The court did not err in telling the jury, in plaintiff's insctruction No. 1, that in determining whether or not assured's death was caused by the excessive use of morphine, the jury should not speculate or guess. Vormehr et al. v. Knights of the Maccabees of the World, 200 S. W. 76, 79. (2) The phrase "burden of proof" was not used in plaintiff's instruction No. 1. The trial judge may, with propriety, refuse an instruction containing the unexplained expression "burden of proof,' and with equal propriety may give such instruction in cases where it does not tend to confuse or mislead the jury. Whether or not the phase should be defined, depends on the context, and the connection in which it is used. Cramer v. Nelson, 128 Mo. App. 379; Morton v. Heidorn, 135 Mo. 608, 617; Jones v. Durham, 94 Mo. App. 51, 54-55; Berry v. Wilson, 64 Mo. 164, overruling Clarke v. Kitchen, 52 Mo. 317, and similar cases; Steinwender v. Creather, 44 Mo. App. 356, 360. (3) (4) Defendant's demurrer to the evidence at the close of the whole case was properly overruled. The attending physician's affidavit in the proofs of death as to the cause of death is not binding on the beneficiary as an admission and does not preclude recovery. It was contradicted by and in direct conflict with the cause assigned in the affidavit of the beneficiary in such proofs of death. The cause of death, so far as the same was disclosed by the proofs of death and the evidence in this case, did not

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present a question of law for the court, but a question of fact for the jury. Bruck v. Hancock Life Insurance Co., 194 Mo. App. 529, 537-541; Vormehr v. Knights of Maccabees, 200 S. W. 76, 78; Zinke v. Knights of Maccabees, 200 S. W. 99; Bamberge v. Tribe of Ben Hur, 159 Mo. App. 102. (5) Plaintiff's instruction No. 2 was not erroneous; it did not in effect tell the jury they could not find the defendant unless they believed the death of assured was caused solely by the excessive use of morphine. The instructions in a case are to be read and considered together, for a partial view in one instruction may be helped out by another instruction. Traylor v. White, 185 Mo. App. 325, 331; Hughes v. Railroad, 127 Mo. 447, 452-3; Owen v. Railroad, 95 Mo. 169, 181; Swafford v. Spratt, 93 Mo. App. 631, 637.

REYNOLDS, P. J.—This is an action on a benefit certificate issued to the husband of plaintiff, plaintiff named as beneficiary, defendant association agreeing to pay her $1500 within 90 days after receipt by defendant of satisfactory evidence of the death of the husband.

The petition avers that the husband had complied with all the requirements as to payments, and that he died on July 1, 1913; that plaintiff had furnished the necessary proofs of death, and that defendant had refused to pay, judgment is demanded for $1500, with interest from November 1, 1913.

The answer, admitting the incorporation of defendant, and issuing of the certificate, and that proofs of death had been furnished, sets up that after the issue of the policy, a by-law had been adopted to the effect that the benefit certificates issued to a member should become void and all benefits thereunder should be forfeited "in case the member shall use intoxicants, opiates or other narcotics to such excess as to directly or indirectly cause his death." Averring that the deceased had become addicted to habitual and intemperate use

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of morphine, which directly contrubuted to and caused his death, defendant denies liability.

There was a reply to this, and a trial before the court and jury, which resulted in a verdict and judgment for plaintiff for the amount claimed, from which defendant has duly appealed.

Along with the proof of death was the statement of the attending physician, that he had first attended the decedent June 26, 1913, and again June 29th, and that he died July 1st; that the exact nature and duration of the disease of which the decedent died was, "Morphine habit for years; morphinism and exhaustion." The beneficiary in her statement gave as the cause of death, "Overheated about a year ago; never really well since. Heat again affected him. Unable to work eight days; in hospital six days."

There was testimony to the effect that the deceased had suffered an attack of heat prostration about a year before and again a few days before he was taken to the hospital, where he died, and that he had also had a fall from a ladder which had injured his head and rendered him unable to work or attend to business for quite a while.

The physician who had signed the certificate above referred to, a member of the staff of the hospital to which deceased had been sent, on being examined as a witness, gave it as his opinion that he had died from morphinism, but admitted that he had not applied the usual tests to determine that; had only examined and treated the patient two or three times while at the hospital, a few days before his death; knew nothing of his previous history. Another physician, who was the family physician of the decedent but had not attended him professionally in his last illness, testified that about a year before the death of the insured, he had treated him for heat prostration, from which he was suffering; had sustained a heat stroke; that he had been sick from that for two or three weeks, during which time he was under the care of witness. Decedent had also been

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afflicted with a hydrocele, necessitating the drawing off of water from a sack. Witness had tapped decedent every two or three months, the decedent coming to his office for that purpose. In June, 1913, the witness was called in to attend decedent and found him again suffering from a heat stroke and delirious; that was four or five days before he was sent to the hospital, which occurred on the advice of this physician, the patient being so violent that witness deemed it best to have him sent to a hospital and he was accordingly sent to the Alexian Brothers' Hospital, the only private hospital in the city where mental diseases are treated; saw him once after he was at the hospital, not professionally, however; just went down there so that he could tell the family how he was doing; had examined him before he was sent to the hospital and from his symptoms determined that he was suffering from over heat; had the ordinary, usual symptoms indicating that. All the examination he made of him at the hospital was to walk in by his bed and feel of him, and saw that he was unconscious; that was either the day, or the day before, he died; not more than twenty-four hours before his death. The weather in June, 1913, was "pretty hot weather;" thought we had had an extraordinarily hot June that year. Witness had examined decedent four or five days before he was sent to the hospital on the occasion of his last sickness. In his opinion the man had died from cerebral congestion, a form of brain fever but in the case of this man it was caused by the fall, which he had had sometime before, and by those two strokes of over heat. Asked if during the time that he had examined decedent, he showed any symptoms of chronic toxine or morphine poisoning, he answered that he did not and that he (witness) never saw a man when he could detect that he was a user of it, but decedent had told him a year prior to his death that he used it; that if he had not told him, witness could not have detected it; the only way to detect a chronic user of morphine is to place him where he cannot get it and it will soon tell itself then. This

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physician did not say to what extent the decedent told him he had used morphine.

A number of the fellow workmen of the decedent, who was a stationary engineer, many of them having worked with him for over twenty years, testified to the fact of his having suffered on two occasions mentioned from heat prostration to the extent of being disabled from work, and also to his having sustained a fall from a ladder, which rendered him unconscious, he striking his head. Every one of these testified that being with him from day to day for a long period, they had never seen any indication of his using narcotics or morphine in any form, nor at any time showing any symptoms of being under the influence of drugs.

In short, the testimony in the case as to the cause of death was conflicting, there being substantial evidence to sustain the theory of plaintiff. That of course made it a case for the jury and its finding on that is conclusive on us, and its verdict and the judgment must stand unless the jury were wrongfully instructed or some error occurred in the progress of the trial. As to the latter, there is no claim. Certain instructions are complained of.

Appellant claims that plaintiff is bound by the statement of the physician which she forwarded with proofs of death. While that certificate gives morphinism as the cause of death, the statement of the beneficiary gives an entirely different cause. In other words, they conflict.

In Bruck v. John Hancock Mut. Life Ins. Co., 194 Mo. App. 529, 185 S. W. 753, we held that where there was a conflict between the statement in the proofs of death made by the beneficiary and that made by the physician, it could not be said that filing the certificate of the physician constitutes such an admission against interest as to be conclusive upon plaintiff in the action. That is the situation here. As before said, it left it a question for the determination of the jury.

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Complaint is made of the first instruction given at the instance of plaintiff, in that it told the jury that they could return a verdict for plaintiff unless they found and believed from the evidence that the death of John W. Holmes was brought about directly or indirectly by the excessive use of morphine; and that the burden of proof was on defendant to prove that John W. Holmes died from the excessive use of morphine; and that in determining whether his death was caused by such use of morphine, the jury should not speculate or guess, but if they were unable to determine from the evidence whether or not his death was so caused, their verdict should be for plaintiff for the face of the benefit certificate.

We see no error in this. It is claimed that the word "burden" should have been defined. Speaking for myself, I think not. It seems to me that is a plain, common, word, easily understood by any one fit to sit on a jury. To attempt to do so is "to illustrate the obvious, explain the evident, and expatiate upon the commonplace." At any rate, using it undefined, is not reversible error. [Berger v. St. Louis Storage & Commission Co., 136 Mo. App. 36, l. c. 43 and cases there cited, 116 S. W. 444.]

Nor do we find any error in telling the jury that they are not to speculate or guess. This was here used on an entirely different state of facts from those present in Peperkorn v. St. Louis Transfer Ry. Co., 171 Mo. App. 709, 154 S. W. 836, and in State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison et al., 187 S. W. 23, a decision by our Supreme Court, not officially reported, where their use was condemned.

Instruction No. 2, given for plaintiff, is complained of. That told the jury that plaintiff was entitled to a verdict of $1500, with interest at six per cent per annum from the first of November, 1913, unless the jury found and believed from the evidence that John W. Holmes came to his death from the excessive use of morphine. We see no error whatever in this. It presented the issue clearly, fairly and intelligently

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The law as to these cases has been so often before our courts that we do not think it necessary to enter into an enumeration or citation of authorities *in extenso*. It is sufficient to say, summarizing, that there was ample evidence to sustain the verdict, that there was no error in the instructions, and that we find no reversible error in the case.

The judgment of the circuit court is affirmed. *Allen* and *Becker, JJ.*, concur.

R. H. STEVENS, Trustee, C. H. BECKMAN and ELIZABETH LAUFER, Appellants, v. HOME INSURANCE COMPANY, a corporation, Respondent.

St. Louis Court of Appeals. Opinion Filed June 4, 1918.

1. **TRUSTS: Mortgages and Deeds of Trust: Trustees in Deeds of Trust: Powers: Indorsing Draft not Delegable: Fire Insurance.** The loss under a fire insurance policy, payable to the trustee in a deed of trust, as interest may appear, is not paid where the draft of the insurer, made payable to the owner and such trustee, was delivered to the owner, endorsed by the owner, and taken to the office of the trustee whose son endorsed the name of the trustee on the draft, and delivered it to the agent of the insurer, who converted the proceeds, and *held* that the holder of the note was entitled to have the trustee, and no one else for him, determine when to append his signature to the draft, and received the funds into his own hands and make proper disposition thereof, or see to it that before surrendering the draft, endorsed by him as trustee, that the note secured by the deed of trust was properly credited with a payment of the amount of the draft.

2. ———: ———: ———: ———: **Indorsing Draft not Ratifiable.** Furthermore, there can be no ratification by the trustee of an act which it is not within his power to delegate to an agent to do.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Leo. S. Rassieur*, Judge.

REVERSED AND REMANDED.

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Seebert G. Jones and *Alphonso Howe* for appellants. (1) R. H. Stevens, trustee, could not under the law delegate to his son, or any other person, power or authority to act for him under this deed of trust, or to act for him in the handling of this trust fund. Markel v. Peck, 144 Mo. App. 701; Graham v. King, 50 Mo. 22; Bales v. Perry, 51 Mo. 449; Anderson v. Roberts, 147 Mo. 486; Pollihan v. Revelry, 181 Mo. 622; Vail v. Jacobs, 62 Mo. 133. (2) Under the provisions of the policy, "Loss, if any, payable to R. R. Stevens, trustee, as interest may appear," the payment had to be made to him and a payment made to Elizabeth Laufer did not and could not constitute payment. Franklin v. National Ins. Co., 43 Mo. 491; Parks v. Conn. Fire Ins. Co., 26 Mo. App. 511. (3) B. C. Stevens, Sr., was the general agent at Clayton, Mo., for the Home Insurance Company, and had power to issue policies, and notice to him was notice to the company, and he had power to waive any defect of title, and he had full knowledge of the condition of the title and that the property was in the name of Emil Laufer and Elizabeth Laufer and made out the policy in favor of Elizabeth Laufer alone, and the company accepted premium and treated the policy as subsisting and valid. They are now estopped to claim the policy void. Parks v. Phœnix Ins. Co., 20 Mo. App. 536; Roberts v. State Ins. Co., 26 Mo. App. 92; Breckenridge v. Insurance Co., 87 Mo. 62; Thomas v. Insurance Co., 20 Mo. App. 151. (4) It is a settled rule of law that where the principal employs an incompetent or untrustworthy agent and injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *responeat superior* applies, provided, only that the agent was acting at the time for the principal and within the scope of the business entrusted to him. Chicago Herald Company v. Bryan, 195 Mo. 574; Garretzen v. Duenckel, 50 Mo. 104. (5) Under the pleadings and the evidence adduced and the law as applied thereto, the judgment should have been for the plaintiffs.

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Fauntleroy, Cullen & Hay and *Fyke & Snider* for respondent.

(1) Upon receipt and acceptance of the draft by Mrs. Laufer, the insured, the obligation of respondent was discharged. Anthony v. Insurance Co., 48 Mo. App. 65, 70; Branigan v. Insurance Co., 102 Mo. App. 65, 70, 73; Still v. Insurance Co., 185 Mo. App. 550 558. If a suit could be maintained by the insured, and if a judgment in favor of insured would bar an action by the trustee on mortgagee, no reason is perceived why payment to the insured would not satisfy the demand. (2) Even if it was necessary that the draft be made payable to R. H. Stevens, trustee, or to him and the insured, the endorsement of the draft by R. H. Stevens, trustee, by his son, was a good endorsement. We do not dispute the proposition that a trustee cannot delegate his power to make sale; because that act requires the exercise of judgment and discretion, but mere mechanical, clerical or ministerial duties may be done by others. Polliham v. Reveley, 181 Mo. 636. (3) The draft in this case was not entrusted to B. C. Stevens by respondent, but was entrusted to its adjuster in the Pierce Building, who delivered the same to insured. It was her act in delivering the draft to B. C. Stevens, Junior, which enabled B. C. Stevens to get hold of the money.

BECKER, J.—This is an action upon a policy of fire insurance. The case was tried before the court without the intervention of a jury. The case was submitted upon the testimony adduced for the plaintiffs, the defendant offering no evidence. From a judgment in favor of the defendant and against the plaintiffs, plaintiffs bring this appeal.

The evidence shows that plaintiff Elizabeth Laufer was the owner of certain improved real estate upon which the defendant company had issued a policy of fire insurance in the sum of $1500. Under the terms of the policy the "loss, if any, (was) payable to R. H.

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Stevens trustee, as interest may appear subject, nevertheless to all the conditions of this policy." The policy was issued by one B. C. Stevens, Sr., who was the general agent of the defendant insurance company for the county of St. Louis, in which county the insured property was located.

Some months prior to the taking out of the policy in question Mrs. Laufer and her husband had borrowed $1750 from the said B. C. Stevens, Sr., and had executed their note therefor secured by a deed of trust on the insured property in which R. H. Stevens was named trustee.

During the life of the policy the insured building was totally destroyed by fire. Prior to the date of the fire it appears that B. C. Stevens, Sr., had sold the $1750 Laufer note to the plaintiff, E. H. Beckman, and had delivered to Beckman the deed of trust and the insurance policy, together with the principal note and interest notes attached thereto. Immediately after the fire B. C. Stevens, Sr., went to Beckman and told him that the property in question had been sold and he would have to have the insurance policy to make the necessary change. The policy having thus been obtained, B. C. Stevens, Sr., saw to it that the necessary proof of loss was made and in due course a draft was issued by the defendant company for $1500 made payable to Elizabeth Laufer and R. H. Stevens, trustee. This draft was delivered to Mrs. Laufer by the adjusters for the defendant company in the city of St. Louis. According to Mrs. Laufer's testimony she immediately took the draft to the office of B. C. Stevens, Sr., where she endorsed the draft and turned it over to B. C. Stevens, Jr., who in the absence of B. C. Stevens, Sr., conducted his business for him. According to her testimony "I left the draft there with B.. C. Stevens, Jr., to be delivered to R. H. Stevens."

The evidence further shows that B. C. Stevens, Jr., took the draft over to the office of R. H. Stevens, trustee, where in the absence of R. H. Stevens, Sr., his son,

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R. H. Stevens, at the request of B. C. Stevens, Jr., endorsed "R. H. Stevens, Trustee," upon the draft. Thereafter B. C. Stevens, Sr., endorsed the draft and deposited it to his personal account in the St. Louis County Bank. The draft was endorsed by the St. Louis County Bank, "all prior endorsements guaranteed," and through its correspondent bank finally reached the National City Bank of New York in due course and was paid by the defendant company. According to the testimony the money realized on the draft by said B. C. Stevens was converted to his own use.

At the close of plaintiffs' case the following declarations of law were given by the court at the request of defendant:

"The court declares the law to be that under the pleadings and evidence the plaintiffs are not entitled to recover and the findings of the court must be for the defendant."

"The court declares the law to be that if the court finds and believes from the evidence that the draft read in evidence was endorsed by R. H. Stevens, trustee, or by some one for him and by his direction or with his knowledge, consent and approval, and that said draft was also endorsed by Elizabeth Laufer and was afterwards paid by defendant, then the plaintiffs are not entitled to recover and the court should find for the defendant."

The court thereupon entered its finding and judgment in favor of defendant.

Appellants' first point is that R. H. Stevens, trustee, could not under the law delegate to his son or to any other person, power or authority to act for him under this deed of trust, or to act for him in the handling of this trust fund. The respondent does not dispute the proposition that a trustee cannot delegate his power to make the sale because that act requires the exercise of judgment and discretions, but argues that the endorsing of the trustee's name, as in the instant case, to the draft by the son of the trustee was but a mere mechani-

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cal, clerical or ministerial duty and therefore delegable. In other words the respondent argues that the act of the son in endorsing his father's name to the draft as trustee does not any more require the exercise of any discretion or judgment than causing an advertisement for sale to be inserted in a newspaper, or the crying of a sale at auction and receiving bids, acts which admittedly may be done by others for and at the request of the trustee.

This view of the respondent we cannot subscribe to. When the draft which was made payable to Mrs. Elizabeth Laufer and R. H. Stevens, trustee, having been endorsed by Mrs. Laufer, was presented to the trustee for his endorsement it became his duty to see to it before surrendering the draft with his signature attached thereto, that a credit of a partial payment in an amount equal to the draft had been endorsed on the principal note secured by the deed of trust on the property which was covered by the policy. This we hold was no mere ministerial duty. It was clearly a matter of judgment and discretion to be exercised by the trustee, an act which was therefore nondelegable. While of course the mere physical act of writing the words "R. H. Stevens, trustee," on the back of the draft we concede is a purely ministerial act in itself, yet the determining whether or not the draft should be endorsed, and when and to whom, if endorsed, the same should be delivered, and under what circumstances, is a matter that calls for judgment on the part of the trustee. This the very facts before us themselves show, for how else could this case have arisen excepting that the trustee himself has not endorsed the draft, but an attempted endorsement of the draft was made by the son of the trustee who relying upon his own judgment appended the endorsement of the trustee thereto, and this too without obtaining the possession of the draft itself, or taking any steps to see that the funds reached the hands of the party in interest, who in the instant case was the plaintiff, Beckman.

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The holder of the note was clearly entitled to have the trustee and no one else for him, determine when to append his signature as trustee to the draft, and receive the funds into his own hands and make proper disposition thereof, or to see to it that before surrendering the draft, endorsed by him as trustee, that the note secured by the deed of trust was properly credited with a payment of the amount of the draft. This has repeatedly been held to be the law and for the reason that the grantor who creates a trust selects the trustee named therein according to the fitness of the trustee to exercise the proper discretion in the execution of the powers with which that trustee is vested. Such selection is predicated upon a confidence in the character as well as the reliance upon the judgment of such trustee, and an acceptance on the part of the trustee of the trust, carries with it the duty of discharging those powers with which he is vested in the light of his own judgment. Therefore the trustee, unless expressly otherwise provided for in the trust itself, cannot delegate such powers which have been conferred on him. It is otherwise, however, with reference to such acts which are purely ministerial —acts which do not require the exercise of discretion. [1 Perry on Trusts (6 Ed.), sec. 408; Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182; Markel v. Peck, 144 Mo. App. 701, 129 S. W. 234; Graham v. King, 50 Mo. 22; Bales v. Perry, 51 Mo. 449; Vail v. Jacobs, 62 Mo. 133.]

Respondent lays great stress upon the fact that R. H. Stevens, trustee, with reference to the appending of his name as for his endorsement as trustee to the draft by his son, testified, "my son has a right to sign my name to anything that he chooses that can be signed without written authority and he signed this in my absence and I recognize it as my signature, as my endorsement." Respondent argues that even though R. H. Stevens, trustee, was out of the city on the occasion when the draft was presented to his son, and though he, the said trustee, therefore did not know anything of the presenting of the draft for such purposes, and did not

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become aware of the facts with reference thereto until some time later, yet he later on expressly ratified the act of his son in so endorsing the draft. As to the ratification by the trustee of this act of his son, it is sufficient to state that there can be no ratification by the trustee of an act which it is not within his power to delegate to an agent to do, and therefore as we have stated above for the purposes of this case the draft never was endorsed by the trustee nor did the proceeds thereof come into the possession of the trustee.

The fact that the draft was delivered to Elizabeth Laufer and that she endorsed it and immediately turned it over to B. C. Stevens, Jr., as the agent of B. C. Stevens, Sr., for the purposes of delivering it to R. H. Stevens, trustee, cannot be held to have been payment of the claim. To the very draft in question was appended: "Received of B. C. Stevens a sight draft on the Home Insurance Company, New York, for the sum of $1500 *which when paid* will be in full of all claims and demands for loss and damage by fire. . . ." (Italics ours). The record is clear that the proceeds of the draft were never paid to Mrs. Laufer and inasmuch as the draft never bore the signature of nor was paid to the trustee, it follows plaintiffs made out a prima-facie case that the defendant has not paid the claim arising under the plaintiff's policy of insurance.

It necessarily follows that the giving of that declaration of law, which in fact was equivalent to an instruction in favor of the defendant, was error. The judgment is reversed and the cause remanded.

Reynolds, P. J. and *Allen, J.*, concur.

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ALEXANDER LANDAU, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, a corporation, and GEORGE C. STINDE, Respondents.

St. Louis Court of Appeals. Opinion Filed June 4, 1918.

1. **LIFE INSURANCE: Premiums: Rebates: Validity of Policy: Construction of Statute.** Although section 6934, R. S. 1909, prohibits discriminations and rebates or any special favor as an inducement to the taking out of a policy of life insurance, and section 6935 provides a penalty for the violation of section 6934, yet where a policy of insurance is executed and delivered, the contract of insurance itself is neither illegal nor void, even though the insured is promised a rebate on the premiums.

2. ———: ———: ———: **Premiums not Recoverable.** When insured received in consideration of his premiums paid, valid policies of insurance, he cannot recover the premiums or any part thereof.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. Wilson A. Tayior,* Judge.

AFFIRMED.

Rippey & Kingsland for appellant.

(1) Under the statutory law of this State life insurance companies, their officers, agents, solicitors or representatives are inhibited from offering to pay, allow or give, directly or indirectly, as an inducement to insurance, any rebate or premium on the policy, and a penalty is provided for the violation of this inhibition as against the Insurance Company, its agents, solicitors or representatives. Sec. 6934, 6935 R. S. 1909. (2) A policy procured upon an offer to pay, allow or give a rebate of premium payable on the policy is illegal, and the policy is void. Downing v. Ringer, 7 Mo. 585; Live Stock Association v. L. & C. Co., 138 Mo. 394; Tri-City Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404; Heffom v. Daly, 133 Mich. 613; Urwan v. Northwestern National Life Insurance Co., 125 Wis. 349; Cassidy v. American Insurance Co., 72 Ind. 95;

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Tillinghast v. Craig, 17 Ohio C. C. 531. (3) When a suit is not based upon the illegal contract or when the parties are not *in pari delicto* any sum paid out as a result of the illegal contract may be recovered in an action for money had and received. Third National Bank v. St. Charles Savings Bank, 244 Mo. 554; Howell v. Stewart, 54 Mo. 400; Union National Bank v. Lyons, 220 Mo. 538; United States Shoe Machinery Co. v. Ramlose, 231 Mo. 508; Lasswell v. Lee, 236 Fed. 322; 9 Cyc, 551, sec. c; 9 Cyc, 252 sec. d.

Jones, Hocker, Sullivan & Angert for respondent, New York Life Ins. Co.

James H. McIntosh, Of Counsel.

(1) Section 6934, Revised Statutes 1909, merely prohibits the allowance of rebates on premiums; it does not invalidate the policy of insurance on which a rebate of premium has been allowed, and the policy itself is valid. Laun v. Pacific Mutual Life Ins. Co., 131 Wis. 559, 9 L. R. A. (N. S.) 1204; Commonwealth Life Ins. Co. v. Bowling, 114 S. W. 327; American National Ins. Co. v. Brown, 201 S. W. 326; Amarillo Ins. Co. v. Brown, 166 S. W. 658; Way v. Lumber Co., 74 Wash. 332; Security Ins. Co. v. Costner, 63 S. E. 304; Meridian Life Ins Co. v. Dean, 62 So. 90; McNaughton v. Des Moines Life Ins. Co., 140 Wis. 214, 122 N. W. 764. (2) If the policy in suit is rendered illegal and void under section 6934, Revised Statutes 1909, as contended by appellant, because of an agreement to allow a rebate of premium thereon, then the plaintiff cannot recover back the premium paid on such policy because the illegal contract was executed. Skinner v. Henderson, 10 Mo. 205; Ullman v. St. Louis Fain Assn., 167 Mo. 273 287; Equitable Life Ins. Co. v. Wetherill, 127 Fed. 944.

BECKER, J.—Plaintiff seeks to recover of the defendant $1374.75 as for moneys had and received. The petition alleges that the defendant George C. Stinde act-

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ing for and on behalf of the defendant New York Life Insurance Company, procured from the plaintiff certain applications for policies of insurance to be issued by the defendant New York Life Insurance Company, on the life of the plaintiff, and, as a direct inducement for plaintiff's taking out the insurance defendant Stinde offered to pay, allow or give to plaintiff a rebate on the premiums payable on said policies; that plaintiff paid to the defendant New York Life Insurance Company $1374.75 as a first premium payable on the purported policies of insurance issued to the plaintiff in pursuance to the applications procured as aforesaid. The petition further alleges that the said policies issued under these circumstances were illegal and void and therefore that no consideration passed to the plaintiff for said sum of money paid by him as premiums therefor; that the plaintiff returned the policies to the defendant New York Life Insurance Company and demanded a return of the money paid by him as the first premiums on the alleged invalid policies of insurance, but that defendant failed and refused to pay the plaintiff said sum or any part thereof.

The defendants filed separate demurrers, each defendant predicating its separate demurrer on the ground that the petition failed to state facts sufficient to constitute a cause of action. These demurrers were sustained by the court. The plaintiff stood on his petition and refused to plead further and final judgment was entered on the demurrers in favor of the defendants; whereupon plaintiff brings this appeal.

The sole proposition presented to this court for determination is the question of the sufficiency of the petition to state a cause of action against either or both of the defendants. To determine this question it will be necessary that we construe sections 6934 and 6935, Revised Statutes of Missouri, 1909, upon which sections plaintiff must rely to warrant a recovery on his part.

Section 6934 prohibits discriminations and rebates or any special favor as an inducement to the taking out of a policy of life insurance. By one of the provisions of

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this section life insurance companies, or any officer, agent, solicitor or representative thereof are prohibited from paying, allowing or giving, or offering to pay, allow or give directly or indirectly, as inducements to insurance, any rebate of the premium payable on the policy. Section 6935 provides as a penalty for the violation of any of the provisions of section 6934 by any insurance company, the revocation of its license to do business in the State and the barring of such guilty company for a period of five years from the further transaction of any business in this State, and further provides that any agent who shall violate any of the provisions of said section shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than $50 or more than $500 for each offense, or imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment.

It is argued by learned counsel for appellant that the penalty inflicted by the statute implies a prohibition against the writing of any insurance upon a promise to rebate a part of the premium, and that policies of insurance entered into in violation of such prohibition of the statute are absolutely void even though the statute itself does not mention that the policies so issued shall be void.

After carefully considering the statute and the undoubted intention of the legislators who enacted the same, and considering the said sections in light of the recognized rules of judicial construction, we cannot hold that a policy of insurance which has been duly executed, delivered and accepted by the insured and the first premium for such policy paid for, is void by reason of the fact that the insurance company or its representatives promised to give the insured a rebate of part of the premium paid for such insurance.

The wording of the statute is plain that it is intended not to prohibit the writing of life insurance but that it prohibits the promising and giving of rebates on premiums. We concede at the outset that any contract en-

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tered into or note given for a rebate would be absolutely void because the statute prohibits the promising or giving of any rebate. But it does not follow from that, that the policy of insurance is void.

It will be noted that the statute places a penalty upon the insurance company or its agent or representative who violates this statute but provides no penality for the insured. To hold the policies of insurance illegal or void, as contended for by appellant, would result in invalidating many contracts of life insurance aggregating perhaps thousands of dollars on which the insured have paid many years' premiums, and this because an agent of the company which issued the policies had, with or without the knowledge of the officers of the company, granted a rebate out of the agent's commission of part or all of the first or other premiums.

We are unwilling to hold the Legislature intended that an insurance company, where a policy has been issued and some part of the premium returned or rebated, should be permitted to proceed for years thereafter to accept the premiums called for under the policy and then upon the demise of the insured be permitted to deny any liability under the policy on the ground that it was void *ab initio* because a rebate had been allowed the insured upon his original or other premium in violation of the statute. Nor can we conceive that it was intended that an insured who had received a rebate, should be permitted at any time within the period limited by law for the commencement of such action, to recover all premiums which the insured may have paid upon the policy because of his having received such rebate, to the disadvantage of the others insured in such company who had conformed to the law and paid the full amount of the prescribed premiums. To hold otherwise would be to reward the very violators of this statute and that too at the expense of those who strictly adhered to the law.

"Insurance companies are engaged in a public business, and upon grounds of public policy insurance contracts that may, in preliminary verbal arrangements be-

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tween the soliciting agent and the insured, have been tainted with the vice of rebating, should, when fully executed and reduced to writing be held valid as between the insured and the insurance company, neither of them being allowed to defeat the contract in any part upon the ground that it was secured in the manner stated in violation of the statute. [Laun v. Pac. Mutual Life Ins. Co., 131 Wisc. 555, 111 N. W. 660, 9 L. R. A. (N. S.) 1204; Quigg v. Coffy, 18 R. I. 757, 30 Atl. 7947; Rideout v. Mars, 99 Miss. 199, 54 South. 801; Security Life & Annuity Co. v. Costner, 149 N. C. 293, 63 S. E. 304; Interstate Life Assurance Co. v. Dalton, 165 Fed. 176, 91 C. C. A., 210, 23 L. R. A. (N. S.) 722; American National Insurance Co. v. Brown (Ky. App.), 201 S. W. 326.]

"When the purpose of a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether whether a contract which violates the statute shall be treated as wholly void will depend on an intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid." [Sutherland, Statutory Construction (2 Ed.), sec. 503.]

It is plain that the purpose of our statute is to regulate contracts of insurance and not to prohibit them. It is equally clear that the statute does prohibit and render void all rebating agreements. Had the Legislature so intended, the statute could have provided that the policy or contract of insurance be void or nonenforceable. The statute is silent as to what effect the violation of the statute shall have upon any policy of insurance that may have been fully executed and delivered. It would thus seem that the insured can be required to pay the full amount of the premiums, whilst the agent or company guilty of the rebating can be punished under the statue. Under such a construction of the statute the full purpose of the law is carried out and the ends of justice subserved without invalidating the policy of insurance itself.

We therefore hold that, considering the object of this legislation, its effect upon the nonoffending policy-holders and beneficiaries, and having in mind the particular penal-

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ties provided therein for any violation thereof, the contract of insurance itself is neither illegal nor void. Plaintiff received, in consideration of his premiums paid, valid policies of insurance and consequently he cannot recover the premiums or any part thereof. It follows that plaintiff's petition fails to state a cause of action and the court properly sustained the separate demurrers of each of the defendants. The judgment is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

HOWARD NORTON, by his next friend, WALTER R. NORTON, Respondent, v. EAST ST. LOUIS RAILWAY COMPANY, a corporation, Appellant.

St. Louis Court of Appeals. Opinion Filed June 4, 1918.

1. **MUNICIPAL CORPORATIONS: Ordinances: Rule of Construction.** Legislative intent is the cardinal rule of the construction of ordinances as well as statutes, and while it is within the jurisdiction and the duty of the court to construe any legislative enactment because of indefiniteness and uncertainty, and endeavor to adopt a construction which will make the statute operative when possibl to do so consistent with reason, yet it is not a function of the judiciary either directly or indirectly to enact legislation nor read into any such enactment that which is not either expressed in the statute itself or appears to have been intended thereby, and where the language of an ordinance is clear and concise, and admits of but one interpretation, the court is not authorized or warranted in speculating as to what might have been intended by such ordinance.
2. **STREET RAILROADS: Regulation of Speed: Construction of Ordinance.** Section 1 of section 1240, Revised Ordinances of the City of East St. Louis, Ill., of 1908, providing that street cars shall not run "at a greater average speed between terminals than twelve miles per hour," cannot be construed as limiting street cars to a maximum speed of twelve miles per hour but said ordinance merely restricts the operating of street cars at a greater average speed between terminals.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. J. Hugo Grimm*, Judge.

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REVERSED AND REMANDED.

Holland, Rutledge & Lashly for appellant.

(1)The court erred in refusing to give the peremptory instruction asked by appellant at the close of all the evidence: (a) Because there was no evidence of any negligence on the part of the appellant. (b) Because the testimony shows that the respondent was guilty of contributory negligence as a matter of law. Hamm v. United Railways Co., 184 Mo. App. 5; Cole v. Metropolitan Street Railway, 121 Mo. App. 610; Kelsay v. Railway Co., 129 Mo. 362, 372; Mockowick v. Kansas City Ry., 196 Mo. 550; Schaub v. Kansas City Ry., 133 Mo. App. 444; Dey v. Railroad, 140 Mo. App. 461; Paul v. United Railways, 152 Mo. App. 577. (2) The court erred in giving respondent's instruction No. 1 as modified by the court of its own motion. The Ordinance of East St. Louis offered in evidence did not forbid the operation of cars at any given time at a rate in excess of twelve miles an hour, but merely provided that the average speed between terminals should not exceed twelve miles an hour. (3) The court erred in refusing to give instruction No. D asked by appellant. See authorities under heading I (b) supra. (4)The court erred in refusing to give instruction No. E asked by appellant. See authorities under heading I (b) supra. (5)The court erred in allowing respondent's witness, Peyton Read, to testify over the objection of appellant that he saw the car in question passing over a street a block west of Seventh street, and that it was then moving at the rate of twenty to twenty-five miles an hour. Such testimony had no tendency to show at what rate the car approached Seventh street or passed over same.

John C. Robertson for respondent.

(1)Violation of the ordinance is negligence *per se,* and proof of such violation makes a prima-facie case for plaintiff. Yonkers v. Railroad, 182 Mo. App. 558; Bluedorn v. Railroad, 108 Mo. 449, 121 Mo. 258; Lueders v.

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Railroad, 253 Mo. 166; Swigart v. Lusk, 196 Mo. App. 471; Criss v. U. Ry Co., 183 Mo. App. 392; Hutchinson v. Mo. Pac. Ry. Co., 161 Mo. 246, 254; Strauchon v. Metropolitan St. Ry. Co., 232 Mo. 587; Nufer v. Metropolitan St. Ry. Co., 182 S. W. 792; Pruitt v. Railroad, 134 Mo. 615; Nier v. Mo. Pac. Ry. Co., 12 Mo. App. 5. (2) Ordinary care did not require plaintiff to constantly look both ways, even if it were possible, when approaching tracks along a street crossing, while upon the track. It is sufficient if before he attempts to cross he satisfies himself in the usual course of things he can cross in safety. Criss v. United Ry. Co., 183 Mo. App. 392; Gratiot v. Mo. Pac. Ry. Co., 116 Mo. 451; Strauchon v. Railroad, 232 Mo. 587; Toll v. Railroad, 169 Mo. App. 260; Railroad v. Baddley, 52 Ill. App. 94; Niehaus v. United Ry. Co., 165 Mo. App. 606; Zander v. Transit Co., 206 Mo. 445; Giddings v. Railroad, 133 Mo. App. 610; Murray v. St. Louis Transit Co., 108 Mo. App. 503; Jackson v. Railroad, 157 Mo. 621; Maloney v. United Rys. Co., 183 Mo. App. 292. Woodis v. United Rys. Co., No. 15011, St Louis Ct. of Appeals, May 7, 1918. A court when construing a statute must when consistent with reason, adopt the Construction which will make it operative. Hawkins v. Smith, 242 Mo. 688; Crowley v. Crowley, 167 Mo. App. 414; Spriggs v. Ribinson, 253 Mo. 271; State ex rel. Rippee v. Forest, 177 Mo. App. 245; Craig v. Railroad, 248 Mo. 270.

BECKER, J.—This is an action for damages on account of personal injuries sustained by reason of a collision between the plaintiff while riding a motorcycle, and one of the defendant's street cars. The collision occurred at the intersection of Seventh street and Illinois avenue in the city of East St. Louis, Illinois. The case was heard in the circuit court of the city of St. Louis resulting in a judgment in favor of plaintiff and against defendant in the sum of $450. Defendant in due course brings this appeal.

Plaintiff's amended petition was based upon an alleged ordinance of the city of East St. Louis limiting the

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speed of street cars to ten miles per hour, and the alleged negligence of the defendant in operating a street car at a rate of speed in excess thereof. The answer was a general denial and a plea of contributory negligence.

At the trial of the case it developed that the ordinance pleaded in the petition had been amended; whereupon plaintiff amended his petition by leave. The ordinance as amended is section 1 of section 1240 of the Revised Ordinances of the city of East St. Louis, Illinois of 1908, which reads as follows:

"No street railway or interurban railway company shall by itself, agent or employees, run any street car upon, on or along any of the streets of the city at a greater average speed between terminals than twelve miles per hour. Any person or corporation violating the provisions of this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense."

Plaintiff tried his case upon the theory that the said ordinance limited the speed of street cars to twelve miles per hour and an instruction given by the court at the request of plaintiff was predicated upon a like interpretation. A careful reading of the record before us shows that plaintiff under the allegations of his amended petition failed to make out a case unless the ordinance relied upon can be construed to limit the speed of cars to twelve miles per hour. But we do not think that the ordinance is subject to this construction.

While it is true that the legislative intent is the cardinal rule of the construction of ordinances as well as of statutes yet that does not authorize or warrant a court in speculating as to what might have beeen intended by such ordinance or statute. There is nothing whatever before us excepting the ordinance itself; it prohibits any street car from being run along the streets of the city of East St. Louis, Illinois "*at a greater average speed between terminals* than twelve miles per hour." (Italics ours). The language of the ordinance is clear and concise and admits of but one interpretation. Learned counsel

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for respondent contends the ordinance contains a "joker" and that the ordinance was really intended to limit the speed of cars to a maximum speed of twelve miles per hour. Even though we were convinced that such were the case, concerning which however we do not express an opinion, we would still be without authority to emasculate the statute in keeping with such view in light of the record before us. While it is within the jurisdiction and the duty of the court to construe any legislative enactment because of indefiniteness and uncertainty, and while the courts will endeavor to adopt a construction which will make the statute operative when possible to do so consistent with reason, yet it is not a function of the judiciary either directly or indirectly to enact legislation nor read into any such enactment that which is not either expressed in the statute itself or appears to have been intended therby. We therefore are constrained to hold that the ordinance relied upon by plaintiff cannot be construed as limiting street cars to a maximum speed of twelve miles per hour as contended for by appellant, but that said ordinance merely restricts the operating of street cars "at a greater average speed between terminals than twelve miles per hour."

In view of what we have said above we hold the court committed prejudicial error in reading the following instruction to the jury: "You are instructed that the lawful rate of speed for street cars in the city of East St. Louis at the time of the collision referred to in this case was twelve miles per hour, and you are further instructed that operating a street car in excess of twelve miles per hour at the place of the collision was negligence." The judgment is accordingly reversed and the cause remanded. *Reynolds, P. J.*, and *Allen, J.*, concur.

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FELIX L. BAUMANN, Appellant, v. CHARLES W. HORN, Trustee, LILLIE L. HORN, et al., Respondents.

St. Louis Court of Appeals. Opinion Filed June 4, 1918.

1. **SHERIFFS AND CONSTABLES: Construction of Statutes: Constable's Bill of Sale: Conclusiveness: Evidence.** A constable's bill of sale purporting to convey shares of corporate stock is not controlled by the provisions of Rev. St. of Mo., 1909, section 2231, making sheriff's deeds to real estate sold under execution prima-facie evidence of the truth thereof, nor does section 2230, relating to sales of corporate stock, make the recitals of such a bill of sale prima-facie evidence of the truth of the matters so recited, and hence the recitals of such instrument do not constitute prima-facie evidence to show that there was a valid judgment, execution, levy, and sale.
2. **FRAUDULENT CONVEYANCES: Husband and Wife.** Conveyances from husband to wife are to be closely scrutinized to see that they are not made for the purpose of defrauding creditors.
3. ———: ———: **Evidence.** In an action by a creditor, evidence *held* to warrant the finding of the chancellor that a conveyance of corporate stock by a husband to his wife was in good faith and upon full consideration.

Appeal from the Circuit Court of the City of St. Louis. —*Hon. William M. Kinsey,* Judge.

AFFIRMED.

R. M. Nichols and *M. A. Haldeman* for appellant.

(1) The bill of sale was admissible in evidence because it is specially provided for by statute. R. S. 1909, secs. 2227 and 2230. (2) The duties of a constable are the same as the duties of a sheriff, and the "General Code" is made applicable to justices of the peace and constables. R. S. 1909, secs. 2201, 2202, 2224, 2247, 2248, 2249; Stegall v. Pigment & Chemical Co., 150 Mo. App. 285; Huhn v. Lang, 122 Mo., 606; Swallow v. Duncan,

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18 Mo. App. 629. (3) The statute specially declares an execution of a justice of a peace to be a lien upon shares of stock of a corporation. R. S. 1909, sec. 7546. (4) If the court subsequently ruled out the bill of sale on the objection made, viz., "on the ground that the bill of sale, standing alone, is no evidence," then the court should have granted a new trial to enable plaintiff to produce other evidence. (5) The objection to the introduction of the bill of sale was general, "on the ground that the bill of sale, standing alone, is no evidence" (Rec., p. 17). As against such general objection, if there could be any informality in it which is not admitted, the bill of sale was clearly admissible. Failure to state any specific objection to the bill of sale is a waiver. Vanstone v. Goodwin, 42 Mo. App. 47; 10 Cyc, p. 366; Hannibal, etc., R. Co. v. Moore, 37 Mo. 338; Bogie v. Nolan, 96 Mo. 85; Babb v. Curators, Etc., 40 Mo. App. 173; Peck v. Chouteau, 91 Mo. 138; Davis v. Hilton, 17 Mo. App. 319; Parsons v. Railroad, 94 Mo. 292. (6) The bill of sale at least made out a prima-facie case for plaintiff of the sale and all the facts therein stated. If defendant Lillie L. Horn, or any of the other defendants, desired to question the right of the officers of the justice court to make the sale of the stock, it was their duty to take proper legal steps to stop the sale by direct action, after the advertisement of the sale was started by the officers of the justice court, or to have claimed the property by way of exemption, or otherwise, if Lillie L. Horn had any right of exemption. Having failed to take such action, defendants are now concluded by the recitals in the bill of sale. Defendants had full knowledge of every step taken in the justice court, because Lillie L. Horn filed a mere general denial in this case, showing that she was unable to plead a single irregularity in the sale. Scharff v. McGough, 205 Mo., 358 Jordan v. Surghnor, 107 Mo. 524; Huxley v. Harrold, 62 Mo. 516; Baird v. St. Louis Hospital Assn., 116 Mo. 419; Samuels v. Shelton, 48 Mo. 444; Pattee v. Thomas, 58 Mo. 164; McCormick v. Fitzmorris 39 Mo. 24; Kendall, etc., v. Bain, 46 Mo. App.

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581; Halderman v. Stillington 63 Mo. App. 212; Sharp v. Sturgeon, 66 Mo. App. 191; Brown v. Loos, 66 Mo. App. 211; Cousins v. Bowling, 100 Mo. App 168; Bobb v. Graham, 15 Mo. App. 289; Evans v. Robberson, 92 Mo. 192. (7) Defendants were not entitled to show in this proceeding, if they could, that there was any irregularity or informality in the proceedings in the justice court, because this would amount to a collateral attack on said proceedings, which is not permitted; besides, the proceedings of an inferior court will not be disturbed for mere errors or irregularities; furthermore, no attempt was made to question any of the proceedings in the justice court. But no such showing could have been made under a general denial, such as filed by Lillie L. Horn. Lumber Co. v. Carroll, 255 Mo. 367; Lovett v. Russell, 138 Mo. 482; Abels v. Webb, 186 Mo. 233; Lingo. v. Burford, 112 Mo. 149; Union Depot Co. v. Frederick, 117 Mo. 138; Hardin v. McCanse, 53 Mo. 255; Brecht v. Corby, 7 Mo. App. 304. (8) A voluntary conveyance by a husband to his wife will be closely scrutinized when the same comes in conflict with creditors, and a transfer of property to avoid creditors is void as to such creditors. The evidence of five witnesses shows that Mrs. Horn had full knowledge of the large indebtedness of her husband. Cole v. Cole, 231 Mo. 237; Zehnder v. Stark, 248 Mo. 46; Snyder v. Free, 114 Mo. 360; Bracken v. Milner, 99 Mo. App. 191; Hoffman v. Nolte, 127 Mo. 120; Balz v. Nelson, 171 Mo. 682; Bank v. Winn, 132 Mo. 87; Farwell v. Meyer, 67 Mo. App. 566; Scharff v. McGaugh. 205 Mo. 364; Benne v. Schnecko, 100 Mo. 256; Loehr v. Murphy, 45 Mo. App' 524; Kennish v: Safford. 193 Mo. App. 362. (9) Three conditions must concur to protect the title of a purchaser where fraud is charged: (1) He must buy without notice of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration. (3) He must be paid the purchase money before he had notice of the fraud. No defense that Lillie L. Horn acquired the stock as an innocent purchaser in

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good faith and without knowledge of the insolvency of her husband could be made under a general denial such as filed by Mrs. Horn, and the court had no right to consider in her behalf these elements or resolve them in her favor in the state of the pleadings and evidence. Such defenses must be specially pleaded. Dougherty v. Cooper, 77 Mo. 528; Check v. Waldron, 39 Mo. App. 21; Holdsworth v. Shannon, 113 Mo. 524; Garrett v. Wagner, 125 Mo. 464; Keiser v. Gammon, 95 Mo. 217; Hoffman v. Nolte, 127 Mo. 135 (and cases cited); Leavitt v. La Force, 71 Mo. 356. (10) Failure of a party against whom fraud is charged to produce as witnesses persons who are alleged to have participated in the fraud, and who are within reach, will raise a presumption in favor of the charge. Chas. W. Horn, although in court at the trial of the case did not testify. Stephenson v. Kilpatrick. 166 Mo. 263; Summers v. Keller, 152 Mo. App. 639 (and cases cited); Mabary v. McClung, 74 Mo. 575; Union Bank v. Stone, 50 Me. 595; 79 Am. Dec. 631. (11) Where fraud is charged in putting away property to hinder, delay or defraud creditors, there is no right of exemption in such property; besides such defense to be available must be specially pleaded and could not be made under a general denial, as was filed by Mrs. Horn. Also inadequacy of consideration and innocent purchaser must be specially plead in order to take advantage thereof. Neither such defenses, however, could be made in a collateral attack. Holdsworth v. Shannon, 113 Mo. 524; Keiser v. Gammon, 95 Mo. 217; Garrett v. Wagner, 125 Mo. 464; Lumber Co. v. Carroll. 255 Mo. 361; Brown v. Chaney, 256 Mo. 225; Bobb v. Graham, 15 Mo. App. 289. (12) A party is at liberty to discredit a witness whom he is compelled to call, or what is known in the law as a compulsory witness. The facts and circumstances surrounding the transfer of the shares of stock were entirely in the breast of the defendants; and for this reason the court will disregard statements of Mrs. Horn in her testimony contrary to common sense or the usual experiences of mankind in similar circumstances, will bear in mind

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her interest in the outcome of the case, and will resolve most favorably any admissions against her interests in favor of plaintiff's case. As shown by the decided cases intent to defraud is usually not susceptible of direct proof, but must be deduced from circumstances tending to prove such intent. The rule does not apply where fraud is charged. 40 Cyc, p. 2560; Maginnis v. Railroad, 268 Mo. 675; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; State v. Stock, 69 Vt. 486; Smith v. Utesch, 85 Io. 381; 52 N. W. 343; Dennett v. Dow, 17 Me. 19; Whitman v. Morey, 63 N. H. 448, 2 Atl. 899; Hart v. Burns, 4 Pa. L. J. Rep. 337; 21 L. R. A. 422; Cole v. Cole, 231 Mo. 237. (13) Lillie Horn, however, introduced no testimony, and under her pleading she is precluded from any defense of innocent purchaser, for the reason that such defense must be specially pleaded and proved and cannot be shown under a general denial. Cole v. Cole, supra; Hoffman v. Nolte, supra; Snyder v. Tree, supra; Holdsworth v. Shannon, 113 Mo. 524; Keiser v. Gammon, 95 Mo. 218; See cases cited under point 5. (14) The alleged advances from Mrs. Horn to her husband were made long prior to the transfer of the stock. She will not now be permitted to absorb all of Horn's estate when creditors intervene. Creditors, extending credit on commercial obligations, have a right to assume that property appearing to belong to a debtor when they extend credit will be liable for their debts, and it is a fraud upon their rights to have debtor, while insolvent, under the facts and circumstances shown by this record, transfer all of his tanglible assets to his wife to cover alleged antecedent debts. Scharff v. McGaugh, 205 Mo. 364; Benne v. Schnecko, 100 Mo. 256; Balz v. Nelson, 171 Mo. 682; Johnson v. Grayson, 230 Mo. 380; Loewen v. Forsee, 137 Mo. 29; Conrad v. Fisher, 37 Mo. App. 356 (syllabus 25). (15) The question of ownership of the stock was settled by the judgment and order of distribution of the probate court. Rottman v. Schmucker, 94 Mo. 139; Covington v. Chamblin, 156 Mo. 574; Sheetz v. Kirtley, 62 Mo. 417.

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Buder & Buder for respondent.

(1) Unless matters of exception are brought to the attention of the trial court by a motion for new trial, and preserved in a bill of exceptions, they cannot be considered on appeal. Hamman v. Coal Corporation, 156 Mo. 232; Keaton v. Keaton, 74 Mo. App. 174; Lorts v. Wash, 175 Mo. 487. (2) The recitals in bills of sale made by constables are not prima-facie evidence of the facts related, under the common law, and our statute does not make them such. 10 Ruling Case Law, Executions, sec. 150; Freeman on Executions, sec. 106; Clem v. Meserole, 44 Fla. 234; Watson v. Tindal, 24 Ga. 494; Sweeney v. Sweeney, 119 Ga. 76; McEntire v. Durham, 29 N. C. 151; Blood v. Light, 38 Cal. 649; Hasbrouck v. Burhans, 52 Hun. 376; Hannah v. Chose, 4 N. D. 351; Williamette R. E. Co. v. Hendrix, 28 Ore. 485. (3) An execution cannot be renewed after it has expired. And in absence of any statutory regulations, an *alias* execution must be treated as a new proceeding, having a lien of its own not ante-dating its teste or delivery, and with no power to revive or continue the lien of anterior defunct writs. At the time in question all writs of execution emanating from a Justice Court were returnable in thirty days. State to use v. Boettger, 39 Mo. App. 684. Real Est. Co. v. Reimann, 116 Mo. App., l. c. 652. Brown v. The Sheriff, 1 Mo. 154. Freeman on Executions, Sec. 202. Laws of 1911, page 309. (4) The fact that the debtor's wife is a creditor does not destroy his right of a preference by a conveyance to her. Gambrel v. Hines, 170 Mo. App. 560. Wood v. Porter, 179 Mo. 56 l. c. 65. Block v. Epstein, 221 Mo. 286, l. c. 309. Robinson v. Dryden, 118 Mo. 534. Almstedt v. Wurdeman, 13 Mo. App. 585. Kincaid v. Irvine, 140 Mo. 615. Jones v. Geery, 153 Mo. 476. Sellers v. Dailey, 29 Mo. App. 174. Van Raalte v. Harrington, 101 Mo. 602. Ridge v. Greenwell, 53 Mo. App. 479. Donk Bros. Co. v. Stevens, 74 Mo. App. 39. (5) The better course, since it tends to prevent a sacrifice of the property, is for the

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judgment creditor to go into equity in the first instance to set aside the conveyance complained of as fraudulent or to open it up to let in the lien of the judgment; but he can also first cause execution to issue under his judgment and buy the property at execution sale, and then go into equity to have the prior conveyance set aside as a consummated fraud standing in the way of his title, but in doing so, he must be held to prove the cause of action stated in his bill. Spindle v. Hyde, 247 Mo. 33, 53; Welch v. Mann, 193 Mo. 326. (6) He who comes into equity must do equity. The object of an execution sale is not to transfer the property of the execution debtor to the execution creditor, but to pay the debt. Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 458; Dibert v. D'Arcy, 248 Mo. 649; Axman v. Smith, 156 Mo. 286. (7) While an appellate court is not bound by the findings or conclusions reached by the trial court in equity cases, yet because of the fact that the trial court had an opportunity to see the witnesses in person, considerable deference is given to the findings of the chancellor. Williams v. Williams, 259 Mo. 251; Hunter v. Briggs, 254 Mo. 28; Llewellyn v. Butler, 186 Mo. App. 525; Motor Company v. Young, 188 Mo. App. 289; Vaughn v. Vaughn, 251 Mo. 447.

George F. Beck for The Worthy Real Estate and Investment Company, Otto A. Weber and Eugene S. Klein.

ALLEN, J.—This is a suit in equity instituted by plaintiff against Charles W. Horn, in his individual capacity and also as trustee for one Benjamin J. Horn, Lillie Horn, wife of Charles W. Horn, the Worthy Real Estate & Investment Company, a corporation, Otto A. Weber and Eugene S. Klein, president and secretary respectively of said corporation.

The petition alleges that the aforesaid corporation was organized under the laws of Missouri with a capital stock of $30,000, divided into three hundred shares of the

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par value of $100 each; that the company has its office in the city of St. Louis, and that defendants Weber and Klein are respectively president and secretary thereof; that the defendants Charles W. Horn and Lillie L. Horn, are husband and wife, and that Charles W. Horn claims to be the trustee of Benjamin F. Horn (meaning Benjamin J. Horn), in respect to certain shares of the aforesaid capital stock.

It is then alleged that on March 18, 1914, plaintiff brought suit against the defendant Charles W. Horn before one Pfeffle, a justice of the peace, and that on March 31, 1914, judgment was rendered in favor of plaintiff against said defendant in that action for the sum of $114.35 and costs; that the said cause of action accrued long prior to March 3, 1914; that on April 1, 1914, at the instance of the plaintiff, execution "in due form as provided by law," was issued upon said judgment and placed in the hands of one Dutzi, constable in and for the justice of the peace district wherein said judgment was obtained that on March 3, 1914, the defendant Charles W. Horn was the owner of twenty-five shares of the capital stock of the aforesaid defendant corporation, having on that day acquired the same by virtue of a final settlement of the estate of his mother, Amelia Horn, deceased, in the probate court of the city of St. Louis; that on March 3, 1914, and for a long time prior thereto, at the date of the institution of this suit, defendant Charles W. Horn was and is insolvent and that on said day he caused twenty of the said shares of stock so owned by him to be placed in the name of his wife, Lillie L. Horn, and caused four shares of such stock to be placed in his own name as trustee for Benjamin F. (J) Horn. And it is alleged that these transfers of said stock by defendant Charles W. Horn were wholly voluntary and without any consideration, were made for the purpose of hindering, delaying and defrauding creditors of defendant Charles W. Horn, and especially this plaintiff; that on April 30, 1914, at the instance of plaintiff, the said constable made a levy under the execution aforesaid, "in accordance with

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the law," upon the said twenty-five shares of stock so of "said writ and levy" with defendant Klein, as secre- owned by defendant Charles W. Horn, by leaving a copy tary of said corporation; that on May 20, 1914, at the placed in the hands of said constable, and that said af- instance of plaintiff, an *alias* execution, "in due form as provided by law," was issued upon said judgment and ficer, on the date last mentioned, gave public notice, by "setting up four advertisements" in four public places in the city of St. Louis, that he would sell the said twenty- five shares of stock at public vendue on June 4th 1914, at the office of said justice and constable, in the city of St. Louis, for the purpose of satisfying such execution, "all in accordance with the law in such case made and provided;" that on June 4, 1914, said constable, "by virtue of said execution, levy and notice of sale, pro- ceeded to and did expose to sale at public vendue" said twenty-five shares of stock, in the presence of more than two persons competent to bid, and that this plaintiff, being the highest and best bidder, purchased the same at such sale for the sum of $5; that "the said levy upon said stock and the sale thereof, and all proceedings lead- ing thereto were in all respects in accordance with the statute and laws of Missouri, and said sale is in all res- pects legal and valid and vested the legal title in and the plaintiff is the legal owner of said twenty-five shares of stock."

It is then alleged that notwithstanding that "plain- tiff is the owner of said shares of stock as aforesaid," the defendants Lillie L. Horn and Charles W. Horn, in- dividually and as said trustee, have refused upon demand to surrender to plaintiff "the certificate or certificates evidencing said twenty-five shares of stock," and that defendants Weber and Klein, as president and secretary of said corporation, and the defendant corporation, have refused to recognize plaintiff as the owner of said shares of stock or to enter his name upon the stock records of said corporation as the owner thereof, and refuse to is- sue to him a certificate evidencing his ownership there-

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of, as is the duty of said defendants Weber and Klein as such officers; that the said twenty-five shares of stock are of the value of $2000; and that plaintiff is without adequate remedy at law.

The prayer is for an order adjudging and decreeing plaintiff to be the lawful owner of the said twenty-five shares of stock, and that all right, title and interest of the defendants Charles W. Horn and Lillie L. Horn, "be forever foreclosed and vested in the plaintiff;" that said defendants be ordered and required to deliver in court the certificate or certificates respecting said twenty-five shares of stock, properly endorsed for the benefit of plaintiff, so that the same may be transferred upon the stock record books of the corporation in the name of plaintiff; and for a further order directing and requiring the defendant corporation and the defendants Weber and Klein, as its said officers, to issue and deliver to plaintiff in due form a certificate evidencing plaintiff's ownership of said stock; that all of the defendants be enjoined and restrained from assigning and transferring or permitting the transfer or assignment of said stock, or any part thereof; and should the defendant corporation and the defendants Weber and Klein, as its said officers, fail or refuse to comply with the orders prayed for against them, that the plaintiff have judgment against such defendants for the value of said shares of stock, to-wit, $2000; and for such other and further relief as may be meet and proper.

To this petition the defendant Charles W. Horn, in his individual capacity, demurred, one ground of such demurrer being that said defendant was not a necessary party to a complete determination of the action. Upon this ground the demurrer was sustained.

The joint answer of defendants Lillie L. Horn and of Charles W. Horn as trustee for Benjamin J. Horn is a general denial.

The defendant corporation and the defendants Weber and Klein filed a joint answer admitting the corporate existence of the Worthy Real Estate & Investment

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Company, and admitting that defendants Weber and Klein are respectively president and secretary thereof. Further answering these defendants allege that on September 19, 1911, there were standing on the books of the corporation fifty-five shares of its capital stock in the name of Amelia Horn, evidenced by certificate No. 10 which had been issued to her on December 14, 1908; that on said September 19, 1911, at the request of said Amelia Horn said certificate was cancelled and two new certificates were issued to her, one for fifty-four shares and one for one share, numbered 17 and 18 respectively; that on the same day certificate No. 18, for one share, was assigned and transferred by said Amelia Horn to the defendant Charles W. Horn, and at the latter's request was cancelled and a new certificate issued therefor in his name, certificate No. 19, which was delivered to him.

This answer further alleges that on or about September 2, 1912, Amelia Horn died testate, and that by her last will and testament, duly admitted to probate, she bequeathed to her son, defendant Charles W. Horn, as trustee for her grandson, Benjamin J. Horn, four shares of said capital stock; that by said last will and testament it was provided that all the rest, residue and remainder of the estate of Amelia Horn be divided in equal shares between her sons Benjamin F. Horn and the defendant Charles W. Horn; that on March 3, 1914, upon the final settlement of said estate, the probate court ordered the balance of the estate, as shown by the final settlement, to be distributed as follows, viz: Four shares of said capital stock to Benjamin J. Horn's trustee, and to Benjamin F. Horn and the defendant Charles W. Horn twenty-five shares of said stock.

And further answering these defendants say that in pursuance of said order of March 3, 1914, they transferred on the books of the defendant company the shares of stock standing in the name of the deceased, four shares to defendant Charles W. Horn, as trustee for Benjamin J. Horn, evidenced by certificate No. 24, five

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shares to defendant Charles W. Horn, evidenced by certificate No. 26, and that "at the request and direction of defendant Charles W. Horn the remaining twenty shares of said stock ordered paid to him were issued to the defendant Lillie L. Horn, evidenced by certificate No. 25. And it is alleged that no stock in defendant company stood in the name of defendant Charles W. Horn other than the above mentioned shares. And these defendants deny that defendant Charles W. Horn caused four shares of stock to be placed in his name as trustee for Benjamin J. Horn, for the purpose of hindering, delaying and defrauding his creditors.

Further answering these defendants say that afterwards, to-wit, on March 10, 1914, the six shares of stock held by defendant Charles W. Horn, evidenced by said certificate No. 19, dated September 9, 1911, for one share, and said certificate No. 26 dated March 3, 1914, for five shares, were, at the request of defendant Charles W. Horn, cancelled and two new certificates issued therefor, one for five shares and the other for one share, in the name of defendant Otto A. Weber; that said six shares were so transferred to defendant Weber in consideration of $450, being "cash paid and money loaned to said defendant from time to time and for cash advanced to him at his request, for his use and benefit." The items (11 in number), being cash advances alleged to have been thus made by defendant Weber to defendant Charles W. Horn, are set out in full with the respective dates thereof, beginning February 4, 1914. and ending March 23, 1914.

And it is averred that the said certificates so issued to defendant Lillie L. Horn and Charles W. Horn as trustee, were, at the times mentioned in plaintiff's petition, and now are, outstanding, and that said defendants appear upon the books of defendant corporation as the lawful holders of said shares. And these defendants aver that they have no knowledge or information sufficient to form a belief as to whether the alleged levy and sale of the shares issued to defendant Lillie L. Horn

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were in accordance with law and gave the purchaser a good title, or whether the defendant Charles W. Horn, at the time he transferred said twenty shares of stock to his wife Lillie L. Horn was insolvent and unable to pay his debts, or whether such transfer was voluntary, without consideration and made for the purpose of hindering, delaying and defrauding said defendant's creditors. And these defendants further aver that they have no interest in or claim upon such shares, or the four shares issued to defendant Charles W. Horn, as trustee, and that they have always been and are now ready and willing to transfer all such shares to plaintiff when it has been determined that he is lawfully entitled thereto; that they have declined to transfer said shares to him because they did not know and had no means of determining whether he was lawfully entitled thereto; and they pray upon compliance with any order or judgment of the court they may be discharged with their costs.

To this answer plaintiff filed a reply consisting of a general denial of the new matter therein contained.

The trial, before the court sitting as a chancellor, resulted in a judgment for all of the defendants, dismissing plaintiff's bill. From this judgment plaintiff prosecutes the appeal before us.

At the outset of the trial it was admitted by counsel for Lillie L. Horn and Charles W. Horn, trustee, that Amelia Horn at the time of her death owned fifty-four shares of stock in defendant corporation.

To sustain the issues on his part the plaintiff, over the objections of defendants Lillie L. Horn and Charles W. Horn, trustee, introduced in evidence a bill of sale executed by constable Dutzi on June 4, 1914, purporting to convey to plaintiff, in consideration of the sum of $5, all the right, title and interest of Charles W. Horn in and to twenty-five shares of stock of the defendant corporation. This instrument recites that "judgment was rendered March 31, 1914, in favor of Felix L. Baumann against Charles W. Horn and execution issued thereon April 1, 1914, and a levy was made April 30, 1914, under

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said judgment and execution, as hereinafter set forth;" that on June 4, 1914, at a public sale held by said officer, "by virtue of *alias* execution and levy issued and made under said judgment . . . all in accordance with the law in such cases made and provided" this plaintiff was the highest and best bidder, "at the price and sum of $5." Then follows a clause purporting to convey to plaintiff all the right, title and interest of Charles W. Horn in and to said stock for the consideration aforesaid.

Plaintiff thereupon read in evidence a deposition of defendant Lillie L. Horn, upon the theory that the answers of said defendant contained therein constituted admissions against interest. As to the sworn statements of this defendant thus adduced it is only necessary to say that they tend to show that the twenty shares of stock, shown to have been transferred to her by her husband, Charles W. Horn, were so transferred pursuant to an agreement between her and her husband to the effect that such stock would be so transferred in consideration of moneys which had been theretofore advanced by her, and by her father for her, to Charles W. Horn at various times, and in consideration also of certain trust funds belonging to her son, Benjamin J. Horn, which had been theretofore diverted and used by defendant Charles W. Horn. There is evidence that about $900 was thus due defendant Lillie L. Horn from her husband Charles W. Horn, and that the trust fund in question amounted to about $600.

Plaintiff testified in his own behalf and adduced the testimony of other witnesses. Such testimony tends to show that defendant Charles W. Horn was insolvent at the time of the transfer of the twenty shares aforesaid; it also tends to show that defendant Lillie L. Horn knew that plaintiff and certain other creditors at various times telephoned to the residence of defendant Charles W. Horn in regard to bills which he owed them, but it fails to show that defendant Lillie L. Horn knew that her husband was insolvent (and she denies that she had such

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knowledge, or that she participated in any design on his part to hinder, delay or defraud his creditors.

Defendant Weber testified, but it is unnecessary to notice his testimony further than to say that it is to be deducted therefrom that the twenty shares of stock above mentioned were worth not to exceed $1400 or possibly $1500. The record contains an admission on the part of plaintiff "that the averments in this defendant's answer are true."

We have before us an opinion filed by the learned chancellor below disposing of the case. As it is somewhat lengthy we shall not reproduce it here. We are of the opinion, however, that the conclusions of the trial judge are sound, and that this judgment should not be disturbed.

In the first place plaintiff, we think, failed to substantiate essential averments of his bill. As to his alleged judgment, execution, levy and sale, plaintiff introduced nothing but the aforesaid constable's bill of sale. We regard it as quite clear that the recitals of this instrument do not constitute prima-facie evidence if the existence of a judgment in plaintiff's favor, as alleged, and of the subsequent proceeding claimed to have been lawfully and regularly had thereunder leading up to the sale. This bill of sale is not controlled by the provisions of section 2231, Revised Statutes, 1909, making the necessary recitals in a sheriff's deed to real estate sold under execution prima-facie evidence of the truth thereof. Section 2230, Revised Statutes, 1909, provides that the officer making a sale of corporate stock "shall execute an instrument in writing, reciting the sale and payment of the consideration, and conveying to the purchaser such rights and shares." etc. There is no statutory provision making the recitals of such a bill of sale prima-facie evidence of the truth of the matter so recited; and in no event could such instrument be prima-facie evidence of matters not required to be therein recited. Prior to the enactment of section 2231, supra, in its present form, a sheriff's deed was not prima-facie

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evidence of the facts therein recited (See McCormick v. Fitzmorris, et al., 39 Mo. 24; Samuels v. Shelton, et al., 48 Mo. 444). And we perceive no ground upon which the bill of sale before us can be given the evidentiary effect which appellant ascribes to it. We need not discuss other questions referred to by counsel in this connection. Standing alone the bill of sale did not suffice to show that plaintiff had lawfully acquired title to this stock as alleged.

But regardless of the matter above discussed, we are of the opinion that plaintiff failed to make out a case in equity entitling him to the relief sought, or to any relief. It is conceded that plaintiff showed no right to any stock other than the twenty shares transferred by Charles W. Horn to his wife Lillie L. Horn. And as to these shares we are satisfied that the finding and judgment below are correct. Owing to the relationship of the parties the transaction in question is one to be closely scrutinized, but a careful consideration of the evidence adduced touching the matter has convinced us that it fully warrants the finding that defendant Lillie L. Horn acquired such stock in good faith and upon full consideration. Such was the conclusion of the learned chancellor below, and we see no reason to disturb it.

Other questions averted to in the briefs of counsel need not be noticed.

The judgment is affirmed. *Reynolds, P. J.* and *Becker, J.*, concur.

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GEORGE STEPPUHN, Respondent, v. CHICAGO, GREAT WESTERN RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, April 29, 1918.

1. **MALICIOUS PROSECUTION: Railroads.** The plaintiff sued to recover damages, actual and punitive, for false arrest and malicious prosecution by the defendant. The plaintiff, the night and seal clerk for the defendant, assisted one Rhoades, also an employee, to repair a car door as ordered by their foreman, and after the repairs were made he undertook to reseal the car as instructed. While in the act of doing so, he was arrested by two special officers of the defendant and placed in jail, the officer claiming that plaintiff had stolen some merchandise. The plaintiff and Rhoades were indicted by the Federal grand jury but acquitted by the jury when placed on trial. *Held*, that the plaintiff was entitled to recover damages for false imprisonment on the first count of his petition.

2. ———: **Indictment: Prima-Facie Evidence.** Indictment by a grand jury is prima-facie evidence of the existence of probable cause, unless such evidence is overcome by evidence showing that the indictment was obtained by false or fraudulent testimony, or through improper means, or by evidence showing that defendant through its agents, notwithstanding the action of the grand jury, did not believe defendant to be guilty.

3. ———: ———: **Verdict.** A verdict in favor of plaintiff in a malicious prosecution suit establishes the truth of plaintiff's contention that he was lawfully on defendant's premises discharging his duties as an employee at the time of the arrest and refutes defendant's contention that he was on such premises burglarizing a car and the jury having found these facts for plaintiff, such finding amounts to a further finding under the facts in this case that defendant's agents knew that they were testifying falsely before the grand jury when the indictment was obtained by them.

4. ———: ———: **Jury.** While there was no direct evidence that defendant's agents testified before the grand jury, *held*, that the facts and circumstances were such for the jury to say that they did so testify and that the testimony given was false.

5. ———: **Judgment.** Where a purported judgment of a committing magistrate of a State court, on its face, shows a form with blanks reserved for inserting material things necessary to a judgment, with nearly all the blank spaces unfilled, including most of the dates,

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and concluded "turned over to the Federal authorities," *held*, the alleged judgment was so indefinite that it cannot be considered a judgment.

6. ———: **Preliminary Examination.** The fact that plaintiff waived preliminary examination before the U. S. Commissioner was not a confession of probable cause for plaintiff's arrest. (The case of Vansickle v. Brown, 68, Mo. 627, explained.)

7. ———: ———: **Question for Jury.** Whether the right of an employee to safeguard the company's property also includes the right to make an arrest is a question for the jury to determine.

8. **INSTRUCTIONS: Impartial Attorney.** An instruction which tells the jury that to entitle the defendant to avail itself of advice of counsel as a defense to the second and third counts of plaintiff's petition, it must be shown that the defendant in good faith sought the advice of an attorney, and at the time of doing so believed said attorney to be *impartial*, where such attorney was one regularly employed by defendant, is erroneous.

9. ———: **Instructions.** An instruction which assumed that one is the agent of a defendant and acting within the scope of his employment is erroneous, but where the defendant joined in the same error it is not entitled to complain.

Appeal from Jackson Circuit Court.—*Hon Daniel E. Bird*, Judge.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Robinson & Goodrich for respondent.

Warner, Dean McLeod & Langworthy and *Roy B. Thomson* for appellant.

BLAND, J.—This is a suit for false imprisonment and malicious prosecution. Plaintiff having recovered a verdict and judgment, defendant has appealed. The suit was originally against this defendant and the Chicago, Milwaukee and St. Paul Railway Company but was dismissed as to the latter at the close of the evidence.

The facts show that on October 24, 1914, plaintiff was in the employ of defendant as a night yard or seal clerk. At about 6:30 P. M. of that day one

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J. C. Rhoades, who was a car repairer in the employ of the defendant, was instructed by one Ray Hamm, car inspector under whom plaintiff and said Rhoades were employed, to nail up a missing end door of a car containing freight in defendant's yards at Council Bluffs, Iowa. Pursuant to the instructions given, Rhoades procured some boards and tried to nail up the end door from the outside but was unable to do so and informed Hamm of that fact, thereupon, the latter told Rhoades to break the seal on the side door, enter the car and nail up the end door from the inside, and after finishing the work to have plaintiff reseal the side door. These instructions were followed by Rhoades. After having nailed up the end door he tried to close the door through which he had entered but on account of a defective hanger could not close it without assistance, so he went along the track a distance of four to six car lengths where he found plaintiff checking the train, who assisted Rhoades in closing the door. Then, in pursuance of Hamm's instructions communicated to him by Rhoades, plaintiff undertook to seal the car and while in the act of so doing he and Rhoades were arrested about 8:00 o'clock of that evening by Messrs. Hall and Burke; the former being described in the evidence as a special agent whose duty it was to safeguard the company's property, and from the evidence we conclude that his work was in the nature of that of a private detective for the defendant, the latter being a special officer in the employ of the Chicago, Milwaukee and St. Paul Railway Company with a police officer's commission. These special agents or detectives took plaintiff and Rhoades to the freight depot where the latter were questioned and then put them in jail, where they remained until about 10:00 o'clock the next morning.

The next day Hall consulted attorneys representing defendant at Council Bluffs in reference to the advisability of prosecuting plaintiff and Rhoades, and these attorneys advised prosecution. Thereupon, they

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drew up a complaint against plaintiff and Rhoades charging them with breaking and entering a railroad car contrary to the laws of the State of Iowa, which was filed in the superior court of Council Bluffs, Iowa, the judge of that court being an *ex-officio* police judge and committing magistrate. They were arraigned in this court on October 23rd, and at the request of defendant's representatives the case was continued until the following day. In the meantime Hall and the company's attorneys had taken steps toward a proceeding before the United States Commissioner at Red Oak, Iowa, charging plaintiff and Rhoades with unlawfully breaking and entering a railroad car containing merchandise in interstate transit. And on the 24th day of October, 1914, these attorneys filed an affidavit and complaint before said commissioner, sworn to by Hall, making such charges against the plaintiff and Rhoades. When the State case was called on said 24th day of October, 1914, in the superior court at Council Bluffs, Hall announced that he was going to prosecute plaintiff and Rhoades in a court where they had no "pull," meaning the federal court, and the proceedings before the superior court were not pursued by the company's representatives. On October 24, 1914, plaintiff and Rhoades waived preliminary examination before the United States Commissioner and were bound over to the federal grand jury, giving bonds fixed by the Commissioner. Thereafter they were indicted by the United States grand jury on the charge of conspiracy to violate an act prohibiting the stealing of freight, etc., from cars containing interstate shipments, and upon the trial of such charges in the United States District Court were acquitted. Thereafter they brought suits in the circuit court of Jackson County, Missouri, for false imprisonment and malicious prosecution.

Plaintiff's petition was in three counts; the first count asking damages for false imprisonment; the second count asking damages for malicious prosecution before the superior court at Council Bluffs; and

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the third count for malicious presecution before the United States District Court. The jury returned a verdict in the sum of forty-five hundred ($4500) dollars actual damages and five hundred ($500) dollars exemplary damages on the first count; and for twelve hundred ($1200) dollars actual damages and eight hundred ($800) dollars exemplary damages on the second count, and for one thousand ($1000) dollars actual damages and five hundred ($500) dollars exemplary damages on the third count. Defendant filed a motion for a new trial which was overruled as to the first and second counts and sustained as to the third count, and thereupon plaintiff dismissed his suit as to said third count. This appeal is from the verdict and judgment obtained on the first and second counts.

According to defendant's evidence, because of numerous depredations committed by thieves on defendant's property and that of the Chicago, Milwaukee and St. Paul Railway Company, Hall and Burke were making a special effort to guard the property and at the time of these arrests they were engaged in watching for car robbers on defendant's premises and had hidden in the shadow of a sand pile, from which point they saw plaintiff and Rhoades take two boxes of prunes out of the car and then take them several feet away from the car in order to hide them, whereupon the arrests were made. Thereafter they took plaintiff and Rhoades, together with the boxes of prunes, to defendant's depot where plaintiff and Rhoades stated before some employees of the defendant that they were guilty of stealing the merchandise. Plaintiff and Rhoades denied stealing the prunes and the making of the alleged damaging admissions.

It is the contention of the defendant that instead of the proceedings in the superior court having been discontinued by its agents, the judge of that court found plaintiff and Rhoades guilty and turned them over to the federal authorities. This contention is based upon an entry or judgment contained in the

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records of that court. From an examination of this so-called judgment we are satisfied that it shows on its face that there was no intention to enter any judgment whatever against plaintiff and Rhoades. On its face it simply shows a form with blanks reserved for inserting material things necessary to a judgment with nearly all of the blank spaces unfilled, including most of those for dates. This alleged judgment concludes as follows: "———it is considered, ordered and adjudged that defendant ——— is ——— guilty as accused ———. Turned over to federal authorities." The blank before guilty is evidently for the purpose of inserting the word "not" in case it was found that defendants were found not guilty. The alleged judgment on its face shows that most of the blanks where material insertions were required were not filled in. This alleged judgment is so indefinite in its terms that it cannot be considered as a judgment. [1 Black on Judgments (2 Ed.), section 3] The deposition of the judge of the superior court was taken and he testified that the final disposition of the case in that court was that it was reported to him that the case had been taken up to the federal court and there was nothing done in the superior court any more than that the case was discontinued. Defendant did not contradict this by anything except the alleged judgment. There is no showing that the superior court of Iowa had any authority to bind persons over to the "federal authorities," whatever that may mean.

It is the contention of the defendant that the indictment by the federal grand jury is prima-facie evidence of the existence of probable cause. Such is true unless such prima-facie case is overcome by evidence showing that the indictment was obtained by false or fraudulent testimony, or through improper means, or by evidence showing that defendant through its agents, notwithstanding the action of the grand jury, did not believe defendant in that case to be guilty. [Sharpe v. Johnstone, 76 Mo. 660; Peck v.

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Chouteau, 91 Mo. 138; Firer v. Lowery, 59 Mo. App. 92; Wilkinson v. McGee, 265 Mo. 574.]

It is the contention of the defendant that there is no evidence on the part of plaintiff to overcome the prima-facie case made by the showing of the indictment, defendant claiming that there is no showthat defendant or any of its agents or employees appeared before the grand jury at the time the indictment was returned or had anything whatever to do with the procurement of the same. We are unable to agree with this contention. The evidence shows that the attorneys for defendant advised the taking of the case to the United States Court, that these attorneys prepared the information for the federal commissioner, which was sworn to by Hall, and that Hall was subpoenaed as a witness before the commissioner. The record shows that Hall and other representatives and agents of the defendant were very active in the prosecution of plaintiff and Rhoades. Hall not only assisted in the arrest but he went to the company's attorneys to get their advice and assistance in the matter of instituting the proceeding before the superior court, and afterwards he, together with the company's attorneys, started the prosecution in the federal court. While there is no direct evidence that Hall and other employees of the defendant testified before the grand jury, the circumstances all point to the fact that they did. So there was evidence, though circumstantial, that they did so testify. It is difficult to see how there could have been an indictment without the testimony of such parties.

We think the evidence introduced on the part of plaintiff, if believed by the jury, sufficiently rebuts the prima-facie showing of probable cause made by the defendant in proving the indictment. As stated supra, such a prima-facie showing may be rebutted by proof that the indictment was obtained by false or fraudulent testimony, or by a showing that not-

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withstanding the action of the grand jury, defendant in this case through its agents did not believe the defendant to be guilty. The evidence on behalf of plaintiff in reference to what occurred immediately before and at the time of the arrest is plain and clear cut. The evidence on the part of the defendant in reference to these matters was likewise clear cut, and if it is to be believed, plaintiff was rightfully arrested, and, of course, could not maintain this action. There could have been no mistake on the part of Hall and Burke as to what occurred at the scene of the arrest. If plaintiff's evidence is to be believed, and the jury in this case did believe it, then the testimony given by Hall and Burke that plaintiff and Rhoades stole two boxes of fruit from the car was false and there was no ground whatever for plaintiff's arrest.

The jury having found for plaintiff in this case, we must assume that the indictment was obtained through false testimony, for, had the true facts as testified to by plaintiff and Rhoades been stated to the grand jury, there could have been no possible grounds for such indictment, and, of course, there would have been none. And in addition to this, the jury having found plaintiff's version to be true and defendant's to be untrue, they must have found that Hall knew that plaintiff was not guilty at the time of the arrest, but had made the arrest in order to make an example of someone or for some other reason of that nature.

Plaintiff's evidence, if believed, was sufficient to overcome any unfavorable inference or presumption against plaintiff that grew out of the indictment. The fact that plaintiff waived preliminary examination before the United States Commissioner amounted to no more than had the commissioner found that there was probable cause to believe him quilty and had bound him over. By waiving the preliminary examination plaintiff admitted that it was in defendant's power (by false testimony perhaps) to make it appear to the Commissioner that there was probable cause for his

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arrest, but he did not admit that there was in fact probable cause. A binding over by the commissioner would have affected the matter of probable cause exactly the same as did the indictment, consequently a showing that plaintiff waived the preliminary hearing helps defendant no more than the showing of the indictment of the grand jury. [Sharpe v. Johnson, supra; Vansickle v. Brown, 68 Mo. 627.] Of course, where a preliminary examination is waived the case of probable cause made thereby cannot be overcome by a showing of false or fraudulent testimony, as no testimony of any kind was given, but it may be overcome by showing that the prosecutor knew there was no guilt or that thereafter he fraudulently procured the indictment. Defendant makes much of the statement in the opinion in the case of Vansickle v. Brown, supra, appearing at page 637 thereof, "waiving an examination and voluntarily entering into recognizance amounts to a confession by the accused that there is probable cause." This statement by the learned judge who wrote that opinion must be taken in connection with the facts and circumstances under which said statement was made. It seems plain to us that the judge who wrote that opinion meant to say nothing more than if it is shown that there has been a waiving of a preliminary examination and a voluntary entering into a recognizance, a prima-facie case of probable cause is made, and that unless plaintiff introduces evidence to overcome this prima-facie case, then such failure would amount to a confession on the part of the plaintiff that there was probable cause.

It is contention of defendant that if Hall arrested plaintiff under the circumstances claimed by plaintiff, or if he intentionally swore falsely before the grand jury, that he was not acting within the scope of his authority but was pursuing his own ends, for his conduct in these matters could not have been for the purpose of serving defendant in any way and must have been founded upon some personal grudge or ill feel-

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ing, or other personal matter between Hall and the plaintiff.

There is no evidence whatever that Hall was pursuing his own personal ends at the time the arrest was made. He testified that his duties were to safeguard the company's property; that the company had suffered a great many depredations on the part of thieves, and his testimony shows that he was making a special effort to catch a thief or thieves and to discourage further depredations. The evidence shows that Hall reported what he had done about arresting plaintiff and Rhoades, and what he had done toward assisting in their prosecution, to the defendant's superintendent at Clarion, Iowa, and that no objection was made by the defendant or any of its agents to what he was doing or had done. In addition to this, he conferred with the company's attorneys at Council Bluffs, Iowa, and these attorneys assisted Hall in the prosecution. Whether the particular act of the servant was committed in the scope of his employment is often a difficult question and is frequently one of fact to be determined by the jury under all the facts and circumstances. It cannot be determined by any fixed rule but it is rather to be ascertained by the nature of the act, purpose and all the facts connected therewith. If the act is necessary to the accomplishment of the object of his employment or is intended for that purpose, then it may be within the scope of the employment even if in the method of performing the act the servant actually violated instructions or orders. We think that the question as to whether Hall was acting within the scope of his employment was one for the jury. He was employed for the purpose of safeguarding the company's property; he made the arrest and reported to the company and no objection was made by it to his conduct. Whether the employment to safeguard the company's property included the right to make an arrest, and to make one under the circumstances of this case, was clearly one for the jury. [Fellhauer v. Railroad Co., 191 Mo.

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App. 137; Chandler v. Gloyd, 217 Mo. 394; Payne v. Mo. Pac. Ry. Co., 105 Mo. App. 155.] Under the facts in this case defendant's connection with the prosecution, we think, is clearly established. [Carp v. Ins. Co., 203 Mo. 295.]

Defendant complains of the giving by the court of plaintiff's instruction No. 8, which told the jury that to entitle defendant to avail itself of advice of counsel as a defense to the second and third counts of plaintiff's petition, it must be shown that the defendant in good faith sought the advice of an attorney, and that at the time of doing so believed said attorney to be *impartial*. Plaintiff admits that he has been unable to find any case where it is held that an attorney to be consulted must be *impartial*. The rule is stated in Sharpe v. Johnston, supra, l. c. 670, that where the examining magistrate refused to commit or where there has been an acquittal,—

"and it is thus determined that there is no probable cause for the prosecution, any inference of malice which may be drawn from such fact, will be overcome by showing that the prosecutor, after having fully informed himself as to all ascertainable facts bearing upon the guilt or innocence of the plaintiff, and having fully and fairly communicated the same to reputable counsel, instituted the prosecution under the opinion of such counsel that plaintiff was legally subject to a criminal charge, and himself believed such advice to be correct and that the plaintiff was guilty. That is what is meant by consulting counsel, and instituting a prosecution in good faith."

There is no suggestion in this rule that the attorney consulted must be an *impartial* one.

The evident purpose of plaintiff in using the term impartial was to have the jury find that because Hall consulted the regular attorneys for defendant instead of going to some other attorney, Hall was not acting in good faith and had not consulted such an attorney as the law provides that the party under the circumstances may consult in order to exculpate himself.

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It goes without saying that a party may not consult an attorney whom he knows to entertain a feeling of ill will or hatred toward the party to be prosecuted, or under any circumstances would amount to lack of good faith. That he may consult his regularly employed attorneys, if he does so in good faith, we think there can be no question. If one has a regularly employed attorney and any matter comes up wherein the advice of an attorney is necessary, it is but natural that he consult that attorney. Of course, this is constantly done. We do not think it was proper to submit an instruction to the jury which permitted them to find that defendant was not entitled to the favorable inferences awarded it by reason of its agent consulting and laying all the facts before reputable attorneys (provided this was done), because these attorneys happened to be regularly employed, at least in the absence of a showing of lack of good faith. We think the instruction under the circumstances was erroneous and necessitates the reversing and remanding of the cause as to the second count.

Defendant complains of the giving of instructions on the part of plaintiff that assume that Hall was an agent acting within the scope of his employment. We think that these instructions make this assumption, but as the defendant joined in the error in its instructions D and G, wherein a similar assumption is made, it is not now entitled to complain on this score.

Defendant complains that the verdict is excessive. It is not necessary for us to pass upon the excessiveness of the verdict on the second count as the cause as to that count is reversed and remanded. The verdict on the first count was for forty-five hundred ($4500) dollars actual and five hundred ($500) dollars exemplary damages. The evidence shows that plaintiff was detained for twenty-four hours before being released on bond; that upon his arrest he was searched and put in a place which plaintiff describes as a hole in the basement on the ground floor of the jail; that the cell was poorly ventilated and lighted and had no

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beding of any kind so that he had to lie upon a couple of steel shelves, and that the place was dirty and filthy and infested with insects. The evidence discloses no reason why plaintiff could not have been arraigned before the superior court and permitted to give bond before he was actually arraigned. The verdict is a large one but in cases of this character the amount of damages is largely a question for the jury. Numerous considerations must necessarily enter into the question as to what is just compensation in such a case, but no definite rule can be laid down as to any of them. The law has provided that the jury shall decide this question. Disgrace is a relative term. What is such to one man is not necessarily so to another. Mental anxiety and pain caused thereby and humiliation and danger from a prosecution for a grave criminal offense, are all conditions for the jury, as well as the jeopardy in which the liberty of the plaintiff was placed by such prosecution. We are unable to say, in view of all the circumstances, that the verdict was excessive. [Carp v. Ins. Co., supra.]

The judgment is affirmed as to the first count but reversed and remanded as to the second count. All concur.

CHARLES BATHGATE, Appellant, v. EXCHANGE BANK OF CHULA, Respondent.

Kansas City Court of Appeals, May 20, 1918.

1. **BANKS AND BANKING: Certified Checks: Interpleader.** Under the circumstances of this case, a bank holding a certified check on which payment is stopped has the right to have contending claimants to the fund affected by the check, litigate and judicially determine who is rightfully entitled thereto.

2. ———: ———: ———. A bank certifying a check at the request of the drawer, does not agree that it would pay the check at all events, but only that the amount thereof would be forthcoming if delivered and when presented by one lawfully entitled thereto.

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3. **PLEADING: Interpleader.** The fact that a bank, interposing its plea for a bill in the nature of an interpleader, did not follow the steps laid down in section 94, Laws 1915, page 148, is not fatal since that act says: "The remedy provided in this section shall be in addition to and not in exclusion of remedies now or hereafter existing."

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

AFFIRMED.

Scott J. Miller and *Lavelock & Kirkpatrick* for appellant.

Paul D. Kitt and *L. A. Chapman* for respondent.

TRIMBLE, J.—This is an action upon a certified check for $2000 drawn on the defendant bank by one, O. T. Larson, and in which plaintiff was made payee. The defendant's answer was in the nature of a bill of interpleader. The trial court overruled plaintiff's demurrer to the answer and plaintiff thereupon filed a reply. The chancellor then heard the evidence, sustained the prayer for an interpleaer, ordered the defendant bank to pay the amount of the check into court, directed that summons returnable to the next term be issued bringing Larson into court and that he and plaintiff be required to interplead for the fund and that defendant bank be discharged from all further liability. Plaintiff has appealed claiming, first, that defendant was not entitled to maintain a plea in the nature of a bill of interpleader nor to a judgment directing an interpleader be had; and second, that under the evidence, judgment should have been rendered in plaintiff's favor for the amount of the check.

On March 7, 1917, Bathgate and Larson entered into a contract with each other whereby the former agreed to trade a Polo stock of drygoods and groceries, at marked wholesale price plus 10 per cent, for the latter's farm at $100 per acre subject

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to a mortgage thereon of $15000 which Bathgate was to assume, the excess price of the farm above the value of the merchandise to be paid by Bathgate to Larson in cash. It was agreed in the contract that each party should put up $2000 in cash as forfeit money, the same to be forfeited by the party that failed to comply with his contract. Afterward, it was agreed that, in lieu of the $2000 cash, each party should have his check certified and put it up in escrow, so to speak, with the First National Bank of Polo along with the contract until the trade could be consummated, when that was accomplished each was to take down his check. This was done, the drawer of each check getting his respective bank to certify it for him. Larson drew his check (the one here in suit) on the defendant, Exchange Bank of Chula, and had the First National Bank of Polo to send it to the Chula bank for certification and return to the Polo bank to be then put up with said contract. Before the check reached the Chula bank, Larson went to the Chula bank in person and requested them to certify it for him when it came in. The bank did so on March 8, 1917, and returned it to Polo bank where it was then put up along with the contract and Bathgate's certified check.

The parties to the contract then entered upon an invoice of the stock of merchandise. In the course thereof Larson charged Bathgate with fraud in substituting other goods on him or in bringing other goods into the store to be invoiced to him at the contract price which were not in the stock or a part thereof at the time the trade was made, and which he also claimed were worthless. Not being able to come to an adjustment of the difficulty, Larson refused to proceed further, and, claiming that Bathgate was not performing the contract but had violated it, left town.

Bathgate applied to the First National Bank of Polo for Larson's check and when delivery thereof to him was refused, he obtained *ex parte* affidavits from certain parties that Larson had thrown up or re-

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fused to go on with the trade. Thereupon the Polo bank delivered Larson's check to Bathgate. But before Bathgate could present it to the defendant Chula Bank for payment, Larson notified said last named bank not to pay it as Bathgate was not entitled to the check because of his fraud and the breaking of his contract. Larson further notified the defendant bank that if it did pay the money thereon to Bathgate after notice that he was not entitled to said check, he, Larson, would sue the bank for so doing.

Under the conceded circumstances and the facts as found by the court, the defendant bank was entitled to the relief asked and granted by the court, namely, the right to have the contending claimants to the fund affected by the check litigate and have judicially determined who was rightfully entitled thereto. [Roselle v. Farmer's Bank of Norborne, 119 Mo. 84; Gee v. Leaver, 172 Mo. App. 191; Maginn v. Interstate National Bank, 178 Mo. App. 347; City of Brunswick v. People's Savings Bank, 190 S. W. 60.]

The fact that the defendant bank certified the check does not destroy the bank's right to require an interpleader, for, in this case, the bank certified the check at the request of the *drawer* and not of the payee or holder. This fact makes a vast difference in the matter of the bank's liability. And the fact that the bank knew, at the time the check was certified, that it was to be put up with the Polo bank for the purposes above indicated does not change the situation. For the check was not to be unconditionally delivered to the payee. It had not then been delivered to him and was to be delivered only in case of a certain contingency. It never was delivered to the plaintiff by the drawer or with his consent. The Polo bank delivered the physical possession of the check to the plaintiff, but this, of itself, did not make plaintiff the *holder* thereof nor entitle him to demand payment. [Sec. 10022, R. S. Mo. 1909.] Whether he was the lawful holder thereof depends upon whether he or Larson

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violated the contract. And this is a question which could only be finally determined by an adjudication of that issue *between them.* If the defendant bank should itself attempt to make that decision, it would do so only at its peril. The bank, in certifying to the check at the request of the drawer, did not agree that it would pay the check at all events, but only that the amount thereof would be forthcoming if delivered and when presented by one lawfully entitled thereto [McGinn v. Interstate Bank, 178 Mo. App. 347, 354; City of Brunswick v. People's Savings Bank, supra.] Hence the certification was not the creation of a new, independant liability which would defeat the bank's right to have the parties interplead. Before a bank becomes unconditionally liable on a check, it must accept or certify it. [Sec. 10159, R. S. Mo. 1909.] The effect of a certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. [Times Square Auto Co. v. Rutherford Nat'l. Bank, 77 N. J. L. 649; City of Brunswick v. Savings Bank, supra, and cases cited.] *Complete* certification does not arise until a check has been delivered to the payee or holder. [Morse on Banks and Banking, sec. 411.] And it is not until the certification is complete that the bank becomes bound as a direct and orginal promisor to the payee. [Morse on Banks and Banking, sec. 414.] Now, so far as the defendant bank is concerned, it does not know and cannot ascertain, except at its peril, whether said check was legally delivered and whether plaintiff is the lawful holder thereof or not. It is true, it, by its certification, has agreed to pay the same to the lawful holder thereof; but was it rightfully delivered, and is plaintiff such lawful holder? Defendant performs its obligations as to payment by turning the proceeds into court, requiring the drawer and payee of the check to litigate between themselves the question whether it was rightfully delivered and whether plaintiff is the lawful holder. In the case of an uncertified check, the bank, after receiving notice of a dispute as to the holder's right to

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its possession, cannot pay it except at its peril. And the certification thereof at the drawer's request does not lessen, in any degree, its obligation to pay it *only* in case the check was in fact rightfully delivered; nor does such certification add an unconditional duty to pay said check to plaintiff regardless of whether it had been rightfully delivered to him.

Point is made that the bank, in certifying to the check with knowledge of the situation, made a contract with Larson for plaintiff's benefit. But we do not think plaintiff is entitled to recover of the bank on that theory since the scope of the contract is not broad enough to enable plaintiff to invoke that principle. Certainly the bank did not contract *with plaintiff* nor did it lead plaintiff to think that it did. Nor, indeed, did it do more than contract *with Larson* that payment of said check would be forthcoming *if* and *when* presented by one lawfully entitled thereto. The check was never to be presented or paid at all except upon a certain contingency. Whether that event had happened or not could not be determined so as to bind Larson and clearly relieve the bank of liability to him for paying the check to plaintiff after notice not to, unless Larson was first afforded an opportunity to litigate with plaintiff the issue as to who was responsible for the breaking of the contract. This he can do upon the interpleader ordered by the court.

It is said defendant is not entitled to demand an interpleader since the first National Bank of Polo was the stakeholer and not defendant. It is true the Polo bank was the stakeholder as to the physical possession of the contract and checks; but that fact does not change the further fact that the defendant bank, by reason of circumstances then existing and subsequently arising, is the holder of the fund over which two persons assert conflicting claims, with sufficient doubt as to whom it should be paid so as to prevent the bank from paying it to either without running the risk of being sued by the other. [Supreme Council Legion of Honor v. Palmer, 107 Mo. App. 157, 164.]

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The fact that the bank, in interposing its plea for a bill in the nature of a bill of interpleader, did not follow the steps laid down in section 94, Laws 1915, page 148, is not fatal since that act says: "The remedy provided in this section shall be in addition to and not in exclusion of remedies now or hereafter existing."

In our view of the case the judgment should be affirmed. It is so ordered. All concur.

THE CUDAHY PACKING COMPANY, Respondent, v. WILLIAM K. BIXBY, FREDERICK A. DELANO and EDWARD B. PRYOR, Receivers of the WABASH RAILWAY COMPANY, Appellants.

Kansas City Court of Appeals, May 20, 1918.

1. **COMMON CARRIERS: Damages: Meats: Shipments.** Where a shipment of meat is damaged and a notice is sent by the shipper to the carrier and the notice specifies the shipment so that the carrier may readily identify it, and such notice also apprises carrier of the character of the claim and discloses that an investigation is necessary and affords opportunity for that to be done, the shipper will be *held* to have complied with the shipping contract, which specifies that the claim must be filed with the carrier at the point of delivery, or at the point of origin, within four months after delivery.

2. ———: ———: ———: **Notice.** A notice sent by the shipper to the carrier concerning damaged freight is not sufficient, to comply with the provisions of the shipping contract, which specifies that a claim therefor must be filed with the shipper within four months, where no reference is made to damages or loss, much less any claim therefor, and gave no intimation that claim would be filed therefor.

3. ———: ———: ———: ———. As an interstate shipping contract is controlled by considerations having to do with its prime object and general policy of the Interstate Commerce Act, among which is the prevention of discriminations and the establishment of unity of responsibility among all the carriers, dealing with the shipment, a notice of claim for loss given, not at the point of origin or delivery as required, but to the carrier's General Freight Claim Agent elsewhere, is not a substantial compliance with the terms of the shipping contracts. BROWN, J., dissenting.

4. **INSTRUCTIONS: Damages: Measure of.** An instruction giving the measure of damages as the difference between the market value of meat in good condition on arrival at destination, and its reasonable value in the damaged condition is erroneous, where it is contrary to the provisions of the shipping contract regarding such damages.

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Appeal from Jackson Circuit Court.—*Hon. Harris Robinson,* Judge.

REVERSED IN PART AND REMANDED IN PART.

New, Miller, Camack & Winger for respondent.

Sebree, Conrad & Wendorff for appellant.

TRIMBLE, J.—This action, under the Carmack Amendment, is in four counts to recover damages to that many carloads of fresh meat respectively shipped from plaintiff's packing plants at Kansas City and South Omaha to Pittsburg, Pa., Atlanta, Ga., New Haven, Conn., and Jacksonville, Fla. The shipments were made in Cudahy Refrigerator Line cars owned and furnished by plaintiff. They were loaded, iced and sealed by plaintiff at its packing plants and delivered to defendant for transporation under what has come to be known as "uniform" bills of lading, which contained instructions to the carrier to re-ice at certain stations, adding 12 per cent salt, and to re-ice oftener if delayed.

The original petition was filed December 26, 1913, but the trial was had upon an amended petition filed September 30, 1914, with a second amended answer thereto, filed September 29, 1916.

In each of said counts the amended petition alleged that the meat of that shipment was loaded in the refrigerator car, properly iced and at the right temperature, and delivered to the carrier in good condition; that the carier received it thus for transportation, issued its bill of lading and undertook the transportation thereof through itself and connecting carriers, but that when the meat was delivered at destination it was decayed and spoiled; wherefore judgment was prayed for the damage to that particular shipment.

We need not notice the defenses made that the damage, if any, was due to the meat's inherent tendency to spoil, or to plaintiff's carelessness in not

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properly cooling and icing the cars and removing the animal heat from the meat before loading it into the cars. The reply denied these defenses and the issues thus raised were fought out before the jury and settled by its verdict; and no controversy now exists as to them.

The second amended answer set up as a further defense, the failure to comply with the provision in the bills of lading that claims for loss, damage, or delay must be made in writing to the carrier at point of delivery or at point of origin within four months after delivery, and unless claims were so made, the defendant carrier should not be liable.

As to this defense, the reply set up a lengthy recital of facts, hereinafter referred to, by reason of which it was alleged that defendant was estopped to now defend upon the ground that plaintiff did not literally comply with the exact terms of said provision as to notice. The reply then set up certain other facts and pleaded that, by reason of all the facts so stated, plaintiff had substantially complied with the provision as to notice, and to refuse plaintiff the right to take the verdict of a jury on its right to recover on the causes of action set forth in its petition, would be to deny it the rights and privileges claimed by it under the statutes of the United States and under the findings and orders of the Interstate Commerce Commission made pursuant to said statutes.

A trial was had. The court submitted the case to the jury upon all the issues of fact raised by the pleadings, and the jury returned a verdict in plaintiff's favor upon all four counts, assessing damages on the first at $363.06, on the second at $291.81, on the third at $503.33, and on the fourth at $354.95. Defendant appealed.

The main question is whether the trial court, in ruling on the demurrers to the evidence, should have given prevailing effect to the defense of non-compliance with the clause requiring written claim for loss or damage to be presented to the carrier at point of origin or point of delivery within four months?

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For reasons of convenience, we first take up the shipment covered by the second count. It reached Atlanta November 24, 1913. Upon its arrival, plaintiff orally notified the delivering carrier's agent at that place of the spoiled condition of the meat and showed it to him. The next day, November 25, 1915, plaintiff wrote the agent of the terminal carrier at Atlanta, saying—

"Beg to confirm our report to your Mr. Wood yesterday to the effect that car CLR 4836, placed at our branch yesterday afternoon, arrived showing a temperature of 55½ degrees, and that *in consequence of this high temperature,* the *fresh meats* contained in this car *were out of condition,* as we showed your representative who examined these goods. Some of them were in extremely bad condition and will show a considerable loss, all are affected to some extent. Undoubtedly this high tempature *is due to either the car having missed an icing station, or not having been properly iced in transit.* We will handle these goods to the very best possible advantage *and file claim through regular channels covering loss sustained.* Also call your attention to the fact that this car arrived at 4 a. m. and was not placed at our warehouse until 2 o'clock in the afternoon. Think it would be well for you to investigate and explain cause of this delay in placing the car."

In addition to this letter, plaintiff, on March 23, 1914, or three months and twenty-nine days after delivery of the shipment, mailed in Chicage to defendant's Freight Claim Agent in St. Louis a formal written claim for loss thereon, minutely specifying the details involved therein. This formal written claim, even if we can say it reached the Freight Claim Agent the next day, March 25 (which would be the last day of the four months under the rule which excludes the first but includes the last day), was not made at the point of origin or at the point of delivery, but as stated, was made upon defendant's Freight Claim Agent at St. Louis; and, on this account, was clearly

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not a *strict* compliance with the requirements of the four months clause. [Equity Elevator Co. v. Union Pacific Ry. Co., 177 S. W. 773; Watson v. Union Pacific Ry. Co., 178 S. W. 871;] We will not at this time go into the plaintiff's contentions as to the efficacy of this formal claim because of the facts set up by, and proved under, the reply; but will deal with those matters in connection with the shipments in the other counts. What we here consider is whether or not plaintiff's letter to the carrier at the point of delivery, the next day after the shipment's arrival, was a substantial compliance with the contract? It will be noticed that the letter specified the particular car and said the shipment was *damaged* and and in bad condition *because of high temperature, due* either to the car having *missed an icing station* or *not having been properly iced in transit,* and that *claim for loss would be filed* through the regular channels. The letter also called attention to the delay from 4 a. m. to 2 p. m. in setting the car at the warehouse for unloading and suggested an investigation into the same, besides telling the carrier that its representative had been shown the goods and their condition.

The purpose of the shipping contract in requiring that a claim for loss be made is "to give the carrier a fair opportunity to investigate the merits of the alleged loss so that unjust claims may be thwarted; to give the carrier an opportunity to investigate the merits of the claim when the facts are fresh and the information is readily obtainable." [Gees Commission Co. v. Illinois Central R. Co., 193 Mo. App.677, 680.] It is "to allow the carrier an opportunity to investigate and either settle the claim or to prepare for its contest." [Cudahy Packing Co. v. Atchison, Topeka, etc., R. Co., 198 Mo. App. 520, 201 S. W. 623.] "The purpose of the stipulation is not to escape liability but to facilitate prompt investigation." [Georgia, Florida, etc., R. Co. v. Blish

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Milling Co., 241 U. S. 190, 196.] In the case last cited, the stipulation in the shipping contract is identical with the one here involved. In that case, the traffic manager of the delivering carrier telegraphed the shipper that the shipment was refused on account of damage. The shipper asked the nature thereof, and the manager replied that it was slightly damaged by water and rough handling. After the shipper's representative had had an opportunity to examine the condition of the shipment, the shipper sent a final telegram saying: "We will make claim against railroad for entire contents of car at invoice price." The State court held that no notice of claim was given but that the stipulation in the bill of lading was inapplicable. The Supreme Court of the United States held that the stipulation was applicable, but that the provision in the shipping contract should not be construed "as requiring a more formal notice than that which was actually sent;" that the previous communications adequately identified the shipment, "so that this final telegram taken with the others established beyond question the particular shipment to which the claim referred and was *in substance the making of a claim* within the meaning of the stipulation,—the object of which was to secure reasonable notice." (Italics ours). The court further said that the stipulation in the shipping contract "does not require documents in a particular form. It is addressed to a practical exigency and is to be construed in a practical way."

It is true, the letter in the case at bar says the shipper "*will* file claim;" and in Kidwell v. Oregon Short Line, 208 Fed 1, l. c. 3, the U. S. Circuit Court of Appeals said that "to impart the information that a claim will be presented is not to present a claim." But it was there speaking of an *oral* claim or of a claim which did not inform the carrier of either the nature, extent, amount or cause of damage nor afford any definite facts upon which an investigation might

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be had nor which showed that one was required. Even if this last decision may be regarded as construing the stipulation for notice in the shipping contract as "requiring a more formal notice" than the letter in the case at bar, yet the U. S. Supreme Court does not construe the stipulation as requiring such exact nicety and definite formality as is involved in the presentation of a bill for the damage. If the notice specifies the shipment, so that the carrier may readily identify it, and apprises the carrier of "the character of the claim" and discloses that an investigation is necessary and affords opportunity for that to be done, it is sufficient. Besides, the notice in the Blish case, as in the one at bar, said "we will make claim." As bearing on the view that the Supreme Court of the United States gives to this stipulation in shipping contracts a reasonable and practical, rather than a *technical,* construction, see, also, St. Louis Iron Mountain, etc., R. Co. v. Starbird, 243 U. S. 592.

Considering the object and purpose of the stipulation in the shipping contract, that it is to facilitate prompt investigation and is not for the purpose of affording a shield to the carrier whereby it can escape liability for the violation of its duty as a carrier, we are of the opinion that the letter to the delivering carrier in the shipment covered by the second count was a substantial compliance with the requirement of the shipping contract.

The shipment covered by the third count arrived at New Haven July 9, 1912, and the next day, July 10, 1912, plaintiff wrote the agent of the delivering carrier the following,—

"C R L Car 4524, shipped from Kansas City, 7/3/12, arrived 7/9/12, at 10.00 a. m. Upon unloading contents we discovered same to be soft and smeary. We notified your office and your agent Mr. Coffey called and inspected same. Kindly mail us report on same that we may complete our records."

In addition to this letter, plaintiff, on December 29, 1912, sent defendant's Freight Claim Agent at

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St. Louis a formal written claim for loss on said shipment.

This formal written claim was not sent within the four months, and hence, even if, under the peculiar facts set up by plaintiff it was not rendered ineffective because not made at the place specified in the contract, nevertheless, it cannot be regarded as a compliance with the contract as to notice. Nor can the letter in reference to this shipment be deemed a substantial compliance therewith. [Cudahy Packing Co. v. Atchison Topeka, etc., R. Co., 198 Mo. App. 520, 201 S. W. 623.] It made no reference whatever to any *damage* or *loss,* much less any claim therefor, and gave no intimation that a claim would be filed, but merely said the shipment was "soft and smeary," without expressing even a hint that the carrier was to blame, and closed by requesting a report on same so that the shipper might complete its records. The carrier was not informed of any loss or damage, was not notified that it was held liable therefor, or that an investigation was necessary to protect itself. For all that the letter contains, the shipper may have regarded itself as being to blame and merely wanted a report from the carrier to assist the shipper in its investigations. For the above reasons, we think the trial court should have sustained defendant's demurrer to the evidence in support of the third count.

With reference to the first and fourth counts, no written claims of any nature were presented to the carrier either at point of origin or at point of delivery. The shipment covered by the first count arrived at Pittsburgh, its destination, on August 12, 1912. On November 23, 1912, within four months after delivery, a written claim, specific in detail and elaborate in form, was sent to defendant's Freight Claim Agent at St. Louis. The shipment in the fourth count arrived at its destination, Jacksonville, May 28, 1912, and on September 27, 1912, or three months and twenty-nine days after delivery of the property, plaintiff mailed, in Chicago, to defendant's

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Freight Claim Agent in St. Louis, a formal written claim for loss thereon.

Assuming, but without deciding, that proof of the proper mailing of a correctly addressed letter in Chicago on one day is sufficient to raise the presumption that it was received by the addressee in St. Louis on the next day (and hence was within four months), we take up plaintiff's contention that, owing to the facts, the sending of such claim to the Freight Claim Agent at St. Louis instead of to the carrier either at the point of origin or at the point of destination, was a compliance, or at least a substantial compliance, with the terms of the contract.

Up to the time these shipments were made, the rights, obligations and liabilities of the parties to interstate shipping contracts under the Commerce Act had not been construed and determined as they have been since, and were not as well known. At that time little or no attention was being paid by either shipper or carrier to the provisions affecting liability under such contracts, claims being decided and settled upon their merits whether presented in strict accordance with the terms of the contract or not. After the decision in the Croninger case, 226 U. S. 491, announced January 6, 1913, the Interstate Commerce Commission, upon application of a large number of shippers, among whom was the defendant, filed an opinion on February 9, 1914, known as Order or Ruling No. 4844, wherein the Commission recommended that the carriers deal with all claims presented prior to December 1, 1913, upon their merits without discrimination with respect to the rule in regard to the time within which they should be presented. Afterwards, the Commission, in Conference Ruling No. 456, made June 1, 1914, announced that in its view the provision in the uniform bill of lading requiring claims for loss to be made within four months "is legally complied with" when the shipper "files with the agent of the carrier, either at the point of origin or at the point of delivery of the shipment,

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or with the general claims department of the carrier a claim *or a written notice of intended claim* describing the shipment with reasonable definiteness. On June 21, 1917, by Conference Ruling No. 510, the Commission expressed the same view with reference to any provision requiring that claims must be made in writing "within a specified period." The plaintiff set up in its reply the above recited facts and these so called Orders or Rulings, and says that as the Interstate Commerce Commission is the administrative body having in charge the enforcement of the Federal Act, its opinion "is entitled to weight," in the determination of the question whether a presentation of the claim to the Freight Claim Agent was a substantial compliance with the contract. The Supreme Court of the United States, in Boston & Maine Railroad v. Hooker, 233 U. S. 97, 118, did say the action of the Commission was "entitled to weight" but it was speaking of a regulation the Commission had made outside of, and uncontrolled by, any of the terms or provisions of the contract. So, also, the Supreme Court, in the cases of New York, New Haven, etc., R. Co. v. Interstate Commerce Com., 200 U. S. 361, Texas and Pacific Ry. Co. v. Abilene Cotton Co., 204 U. S. 426, and Robinson v. Baltimore, etc., R. Co., 222 U. S. 506, held that the Commission has power to make rules and regulations under which interstate commerce may be transacted and the requirements of the Commerce Act carried out. But clearly the Interstate Commerce Commission was not given the power to change the terms of a lawful contract entered into between the shipper and carrier, or to say that one thing may be substituted for another as sufficient performance of the conditions of the contract. Nor do we understand that the Commission in the above Rulings attempted to do any of these things or to "order" the carrier to accept such substitution in lieu of the contractual requirement. All that the Rulings mean is that the carriers could do so if they

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chose, and if they did, the Commission would not regard them as violating its rules and regulations.

But plaintiff further says that the defense of noncompliance with the provision for notice was not set up until the second amended answer was filed, and defendant had up to that time permitted plaintiff to expend a large amount of costs in preparing for trial with no knowledge or intimation that such a defense would be interposed; furthermore, that all claims theretofore had been filed with the Freight Claim Agent and they had received consideration at his hands and many of them paid; that he was the defendant's officer in general charge of all such claims and who had the direction and control of them as to whether they should be paid or not; and that the defendant had requested plaintiff to file claims with him. By reason of all these matters plaintiff contends that defendant is now estopped to defend upon the ground of failure to make claim in the manner specified in the contract. It is to be observed, however, that with reference to plaintiff's contention that defendant requested it to file claims with the Freight Claim Agent, the evidence shows nothing more than that plaintiff's assistant manager was requested (by some one, not stated whom), to file the claim concerning the shipment in the first count with the Freight Claim Agent. It will also be noticed that the rights and liabilities of the parties had accrued and become fixed under the contract before any of the aforesaid rulings by the Commerce Commission had been made.

Plaintiff also contends that by reason of all the foregoing facts, and since the Freight Claim Agent in St. Louis was the man in general charge of all such claims and to whom they would be eventually referred for consideration, the filing of said claims with him should be regarded as a substantial compliance with the contract. It may be also observed that even if the Freight Claim Agent is the man to whom claims are finally referred for disposition, yet it may well be an important matter that the investi-

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gation of the claim be begun at one or the other of the two places specified in the contract, so that these agents and employees, locally convenient and perhaps more fully acquainted with the facts, may attend thereto at once and within the time required, and the claim may then come to the Claim Agent accompanied by the report of these local and convenient investigators. Consequently, the requirement that the claim must be presented at one or the other of the places specified is not a meaningless or an unimportant matter.

In considering the foregoing contentions of plaintiff, we must keep in mind the nature of the contract involved. It is not the same as the ordinary private contract with which no one except the immediate parties, is concerned. It is an interstate shipping contract, made under and pursuant to the National Commerce Act, and, therefore, must be regarded, construed and enforced in the light of that Act and in view of the broad governmental policies it was designed to set up and enforce. The Federal Act makes the initial carrier responsible for the entire transportation, and seeks to establish "unity of responsibility" and, under that Act, the shipping contract "is not to be construed one way with respect to the initial carrier and in another with respect to the connecting carrier." [Georgia, etc., R. Co. v. Blish Milling Co., 241 U. S. l. c. 196.] In other words, as we understand it, the contract under the Federal act must be construed in the same way whether liability is sought of either the originating, intermediate, or terminal carrier. If, now, we say that, because of the conduct of *one* of them in inducing the shipper to ignore some of the terms of the contract, liability may be enforced against *that one,* then we are destroying the "unity of responsibility" which the Federal Act sought to create. For, obviously the terminal carrier, had it been sued, would not be bound by any outside agreement or conduct on the part of the initial carrier. Hence, under the view contended for by plaintiff, it could recover of the initial carrier but,

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upon precisely the same facts, could not recover of the terminal carrier. The subject-matter of the contract is regulated by the Federal Act in the interest of the public welfare, and to prevent discrimination in every form and by whatever means or device the same may be rendered possible. [Phillips v. Grand Trunk Ry., 236 U. S. 662; Banaka v. Missouri Pac. Ry. Co., 193 Mo. App. 345.] The bill of lading in an interstate shipment must be regarded as containing "the entire contract upon which the responsibilities of the parties rest." [St. Louis, Iron Mountain, etc., R. Co. v. Starbird, 243 U. S. 592, 597.] And the parties "could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore those terms." [Georgia, Flordia, etc., Ry. Co. v. Blish Milling Co., supra.]

In view of these authorities and the nature of the contract, controlled as it is by considerations having to do with the prime object and general policy of the Commerce Act, we are of the opinion that plaintiff cannot claim a substantial performance of the contract either in fact or by way of estoppel. Hence, the demurrers to the first and fourth counts should have been sustained.

It is claimed that the testimony was unsatisfactory and insufficient to enable the jury to form an estimate of the damages sustained; and since the right to recover on the second count is upheld, this contention must be noted. We have examined the evidence in relation to that shipment and find that it was sufficient and hence overrule the contention.

Finally it is claimed that instruction D, with reference to the measure of damages, is erroneous. It authorized the jury, in assessing damages on the second count, if they found for plaintiff and found damages thereon, to take the difference between the reasonable market value of the meat at Atlanta, at the time of delivery, if it had been in good condition, and its reasonable value at that time and place in

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its damaged condition, not to exceed however the value of the meat at the point and on the day of shipment and not to exceed the sum demanded in said second count. The bill of lading contains the following clause,—

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

In the cases of Funsten Dried Fruit, etc., Co. v. Toledo, St. Louis, etc., R. Co., 163 Mo. App. 426, and Brockman Commission Co. v. Missouri Pac. Ry. Co., 188 S. W. 920, the St. Louis Court of Appeals held such an instruction to be erroneous. The opinion in the case of New York, etc., R. Co. v. Peninsula Produce Exchange, 240 U. S. 34, seems to hold that the above stipulation is not to be construed as furnishing a basis of liability but merely as limiting the amount of recovery to the value of the property at the place and time of shipment. It will be noted, however, that the court in speaking of this matter is saying that the State court, from which the case came on writ of error to the Supreme Court, so construed the provision, and that under the evidence in that case there was no error in the instructions. The question of whether the clause in the bill of lading changed the ordinary rule governing the ascertainment of damages seems not to have been gone into further than that. It will be noticed too that on page 41 of said opinion, the court says the State court conceded the instructions were erroneous. However, in the case of Gulf, Colorado & Santa Fe Ry Co. v. Texas Pack-

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ing Co., 244 U. S. 31, the Supreme Court said the invoice price at time and place of shipment was the value of the property at such time and place, namely, $22,238.56. The trial court instructed the jury that in assessing damages they would take the difference between the invoice price, $22,238.56, and the value of the shipment at the time it was delivered. The stipulation in the bill of lading was the same as in the case at bar. The court on page 37 say:—

"Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. [New York, Lake Erie & Western R. R. Co. v. Estill, 147 U. S. 591, 616.] The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

The ordinary rule for the measurement of damages to a shipment injured in transit having been changed by the above quoted clause in the shipping contract, and it being valid and enforceable, the instruction D was erroneous in that it gave the jury an improper standard by which to measure the damages. We cannot say from the state of the evidence that the error was harmless. Hence, the judgment on this count must be reversed and remanded for a new trial.

It follows as a result of the foregoing views that the judgment on the second count should be reversed and remanded for a new trial, and the judgment on the first, third, and fourth counts should be reversed without remanding. It is so ordered. All concur. *Ellison, P. J.*, concurs. *Bland, J.*, concurs in part but dissents as to the part holding that notice to the Freight Claims Agent did not constitute substantial compliance.

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FLOYD JACOBS and SAMUEL FELLER, Administrators of the Estate of NANCY D. MONROE, Deceased, Appellants, v. DORA B. WEBSTER, and EDWARD R. WEBSTER, Respondents.

Kansas City Court of Appeals, May 20, 1918.

1. **TAXES: Subrogation: Mistake.** The plaintiff sued to recover from the defendant taxes paid out on the wrong piece of property by Nancy D. Monroe, now deceased. The latter during her lifetime owned an adjacent lot to that of the defendants and by mistake paid the taxes on their lot instead of on her own. The mistake was made by the city and the taxpayer and the plaintiff desires to be subrogated to the rights of the city and recover back the taxes wrongfully paid. *Held*, that there is no power in equity to order plaintiff or her estate, subrogated to the rights of the city so as to enable the enforcement against the defendant's property of the lien which the city had for taxes thereon.

2. **EQUITY:** ———: ———. The payment of a debt by one not the debtor absolutely extinguishes the debt if there is no agreement that the security therefor shall be transferred and kept alive for the benefit of such payer. But equity, through the doctrine of subrogation, will effect the reimbursement of the payer by substituting him in the place of the creditor where the payer is compelled to pay in order to protect his own rights or to save his own property.

3. ———: ———: ———. In order that the equitable doctrine of subrogation may be invoked, the payment must have been made by one who at the time had, or in good faith, supposed he had, an interest in discharging the demand.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

Ed. E. Aleshire for appellant.

Sebree, Conrad & Wendorff for respondent.

TRIMBLE, J.—After the appeal herein was perfected, Nancy D. Monroe, who was then the plaintiff,

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died intestate and the cause was revived in the name of her administrators, the title being changed to conform to such revival. So when we hereinafter refer to plaintiff it will be understood that we mean plaintiff's intestate and not her administrators.

Plaintiff owned the south seventy-five feet of the *east* 132.63 feet of Lot 7 in McGee Place in Kansas City. Defendants were, and now are, the owners of the south seventy-five feet of the *west* 132.63 feet of said Lot 7.

This is a suit in equity brought by plaintiff to recover the park taxes assessed against defendants' lot for the years 1914 and 1915 and, through mistake, paid by plaintiff under the erroneous belief that she was paying the park taxes on her lot. She asked judgment for the amount of said taxes, to-wit, $40.50, and prayed that she be subrogated to the rights of the city as to a lien on defendants' land. The defendants demurred to the petition. The demurrer was sustained and plaintiff stood upon her pleadings and appealed.

In addition to the ownership of the two tracts above mentioned, the petition alleged:

That the park taxes for 1914 on defendants' lot were $20.25 and if paid during September of that year no penalty was added thereto. A similar allegation was made concerning the park taxes thereon for 1915 payable without penalty during September of that year.

That plaintiff, on and before June 1, 1914, requested the city treasurer to furnish her a statement covering taxes, if any, unpaid on the south seventy-five feet of the east 132.63 feet of Lot 7 McGee Place so that she might pay same; that about September 28, 1914, and while she was living in Wisconsin, the city treasurer in response to her request sent her a statement of the taxes assessed against her property, as she believed; and immediately upon receipt of such statement she sent him a money order for such taxes and received from him a receipt

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which, instead of being for the property she owned, was for the property owned by defendants, the same being written in lead pencil and described as: "S. 75 ft. of W. 132.63 ft. Lot 7," instead of the *east* 132.63 feet, but that plaintiff did not notice the error, relying upon the city treasurer to send her the proper statement in reference to property owned by her; that prior to the payment by her of said taxes, her agents in Kansas City had, though without her knowledge, paid the taxes for 1914 on her property, to-wit: on the south seventy-five feet of the east 132.63 feet of said Lot 7.

That plaintiff did not learn of said error and mistake on the part of the city treasurer for a long time, and, in the following year, still being absent from Kansas City, she received a like statement from the city treasurer for the taxes due for 1915 and she immediately returned or sent him the money, $20.25, along with the blank receipt which he duly countersigned and returned to her, the property therein being described exactly as in the 1914 receipt except that it was for the year 1915; that in the meantime her Kansas City agents had, though without her knowledge, paid the taxes on her said property, to-wit, the south seventy-five feet of the east 132.63 feet of said lot 7.

That she never discovered the mistake on the part of the city treasurer nor learned that she had, through mistake, paid the taxes on defendants' property until about January 1, 1916, when she requested the defendants to pay her the said taxes, but that payment was refused.

That she had no interest in the south seventy-five feet of the west 132.63 feet, and when the receipts were sent her by the city treasurer she took it for granted and assumed the city treasurer was sending receipts to her for her own property, and that no jury or injustice would be done by defendants paying said taxes now to plaintiff.

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The statements sent plaintiff by the city treasurer were in the shape of unsigned tax receipts which were afterwards signed and returned to plaintiff upon receiving her money. And each showed on its face that the property to which it referred was the S. 75 feet of the W. 132.63 feet. So that, had plaintiff examined the statements before she sent her money, she would have noticed that it did not describe her property. And while plaintiff alleges that her payments were made through the mistake of the city treasurer, yet it is manifest that she had an opportunity to observe the mistake and failed to do so. There were, therefore, two mistakes, one on the part of the treasurer and one on her part, or perhaps negligence on her part, in not discovering the fact that she was not paying on her own property.

Plaintiff, *in fact,* had no interest or apparent interest in the property actually paid on, to be protected by her payment. She was, in fact, under no compulsion either legal or moral to pay the taxes thereon, nor was she in any way requested by defendants, either directly or by implication, to pay same; nor were defendants in any way, directly or indirectly, the cause of her mistake in thinking she was paying on her own property. The question is, does she, therefore, come within any of the situations wherein equity will afford her the remedy of subrogation, that is, the substitution of plaintiff in the place of the city with all of its rights as a creditor of the defendants for the taxes due from them on their lot, thus making defendants debtors of the plaintiff without their consent and without their having done anything to create that relation or to bring about the situation? The rule is unquestioned that the mere payment of the debt of another by a volunteer or by a stranger will not confer the right of subrogation. If a stranger makes such a payment he cannot obtain the benefit of subrogation in the absence of an agreement to that effect from the debtor. In such case one cannot make another his debtor without the latter's

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consent. And if there is no debt there is no ground for subrogation. [37 Cyc. 375-6.] The payment of a debt by one not the debtor, absolutely extinguishes the debt if there is no agreement that the security therefor shall be transferred and kept alive for the benefit of such payer. [Sheldon on Subrogation, sec. 3.] But equity, through the doctrine of subrogation, will effect the reimbursement of the payer by substituting him in the place of the creditor where the payer is compelled to pay in order to protect his own rights or to save his own property. [Norton v. Higleyman, 88 Mo. 621; Grady v. O'Reilly, 116 Mo. 346; Roberts v. Best, 172 Mo. 67; Cape Girardeau Bell Tel. Co. v. Estate of Hamil, 153 Mo. App. 404.] And it is only in these or like situations that equity will afford such relief. [37 Cyc. 375.]

However, it is insisted that plaintiff was not a stranger nor a mere volunteer, but was led in good faith to believe the taxes were those on her property and she intended to pay, and thought she was paying, them, and hence she ought not to be regarded as a pure volunteer. "A stranger or volunteer, as those terms are used with reference to the subrogation, is one who, *in no event resulting from the existing state of affairs,* can become liable for the debt, and whose property is not charged with the payment thereof and cannot be sold therefor." [Arnold v. Green, 116 N. Y. 566, 573.] (Italics ours). It is true, it is sometimes difficult to ascertain when the payment of a debt by a third person will be considered to have been made by a mere stranger or volunter. [Sheldon on Subrogation, sec. 245.] And there are authorities which say that payments made in ignorance of the real state of facts cannot be said to be voluntary, and that where a person has paid a debt under a colorable obligation to do so, in order that he may protect his own claim, or under an honest belief that he is bound, he will be subrogated; also that one who mistakenly but in good faith believes he has an interest in property to protect which he discharges a

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lien, will be subrogated to the lien for his repayment. [37 Cyc. 378-9.] And in Roberts v. Best, supra, at page 81, the opinion remarks "that before the equitable doctrine of subrogation can be invoked . . . the payment must have been made by one who at the time had, *or in good faith supposed he had,* an interest in discharging the demand." (Italics ours). But, in the case at bar, plaintiff sustained no relation whatever to defendants' lot. There were no circumstances which led her to think she was interested in *it* or that she ought to pay the lien on *it*. She was seeking only to care for her *own* property, a different tract entirely; and she paid on defendants' lot only by reason of her own and the treasurer's mistake. An examination of the authorities holding that one is not a volunteer or stranger who, in ignorance of the true facts, pays to protect his own claim or because he believes himself to be bound, or where he believes in good faith he has an interest, will disclose that the one thus paying, and allowed to be subrogated, sustained some relation to the property paid on, *other than that brought about by a mere mistake as to the identity of the property* with which he was dealing. [For exemple, see Lewis, Admr., v. Chitlick, 25 Fed. 176; Cobb v. Dwyer, 69 Me. 494; Muir v. Berkshire, 52 Ind. 149; Cockrum v. West, 122 Ind. 372; Fowler v. Parsons, 143 Mass. 401; Dwante v. Eannaco, 72 N. Y. Supp. 1048.] In some, if not all of these cases, the party paying did have an interest in the particular property paid on and hence came within the provisions of the general rule; at any rate in all of them the one making the payment sustained some relation to the particular property paid on and intended to be affected, by reason of circumstances actually existing, and not through a mere mistake as to the identity of the property dealt with. But here, as stated, plaintiff's payment arose solely out of a mistake of this character, and it is a mistake with which defendants had nothing to do. This is not a suit to recover money

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from the other party to a transaction on the ground that it was paid to him under mistake; but it is a proceeding to make defendants debtors to plaintiff by substituting the latter in the city's place. It may not be out of place to observe here that but for the separate payment by both plaintiff and her agents, independently of and without consulting each other, there would not have been but one payment on each year's taxes; and, therefore, even if plaintiff's payment had been by the treasurer erroneously credited to defendants' lot, she would have had a remedy against the city or the treasurer to correct that and have her payment properly applied without attempting to invoke the equitable doctrine of subrogation against defendants. However this may be, the facts stated in the petition disclose that the only ground upon which she sought to obtain the remedy of subrogation is that of mistake on her part and the part of the city treasurer. In such case, the rules of equity afford no such relief. It is not a question of what the defendants or one in their situation, if actuated by the highest sense of honor or the desire to be a "thoroughbred," would or should do. It is a question of the *existence of the power in equity* to make them do, or rather of the power to put plaintiff in the city's place where she or her estate can make them act. However, the only ground upon which a noble spirited person would feel impelled by high principles to repay plaintiff, is that, by the payment she made, she had relieved his property of a burden it would inevitably have had to bear. As to this, it will be noticed that there is no such allegation in the petition, save the one that no injustice would be done to defendants in paying said taxes to plaintiff. This, however, would seem to be only a legal conclusion unless the allegation that the payment made by plaintiff carries the necessary inference that thereby defendants were relieved of the payment of their taxes.

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Be this as it may, however, we have not the power in equity, under the circumstances disclosed, to order plaintiff, or her estate, subrogated to the rights of the city so as to enable the enforcement against the defendants' property of the lein which the city had for the taxes thereon. Hence, we affirm the judgment. All concur. *Ellison, P. J.*, in separate opinion.

ELLISON, P. J., (concuring)—I concur in the foregoing opinion for the reason that the petition is based upon plaintiffs alleged right to be subrogated to the city. But I think if one, by mistake, pays the debt of another and that other acquiesces by accepting the discharge of his indebtness, he is liable to the party who pays his debt. While the payment of taxes on land is not the payment of a debt, in the strict sense, it amounts to the same thing; if the party for whom the payment is made accepts and adopts, without protest, the discharge of his land from the lein for such tax.

SARAH OGDEN, Respondent, v. HARTFORD FIRE INSURANCE CO., a Corporation, Appellant.

Kansas City Court of Appeals, May 20, 1918.

1. **FIRE INSURANCE: Trustee's Sales.** The plaintiff who was the owner of a house and lot, insured the house against fire with the defendant. The defendant placed upon the policy a mortgage clause to cover a deed of trust upon the property. Two days after the sheriff, acting as substitute trustee, sold the property at auction to one Thompson, the house was destroyed by fire, but Thompson afterwards refused to pay the purchase price or accept the title, and the plaintiff sued the defendant to recover the insurance. It is *held*, that there was no change of interest in the property by reason of sheriff's sale for the reason that the sale was not binding on Thompson, or the sheriff, and that in order that there be a change of interest there must be something done by the sheriff, or the bidder, at the time of trustee's sale at least sufficient upon which to enforce an action for specific performance.

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2. ———: ———: **Statute of Frauds.** It is not necessary that the plaintiff plead the Statute of Frauds in her reply in order to make that point in a trial, for under the general denial contained in her reply to the defendant's answer the plaintiff could object to any offer to prove, by oral testimony, things that were required to be in writing.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain,* Judge.

AFFIRMED.

A. L. Shortage for respondent.

R. S. Robertson for appellant.

BLAND, J.—On the 10th day of April, 1917, plaintiff was the owner of a house and lot in Sedalia, Missouri, and on that day defendant insured said house against fire in the sum of eight hundred ($800) dollars. At the time the insurance was taken out there was a deed of trust on the property securing four hundred and fifty ($450) dollars and accrued interest thereon. A mortgage clause was placed in the policy. On June 14, 1917, two days before the house was destroyed by fire, it having been advertised for sale under the deed of trust, the sheriff of Pettis county, acting as substitute trustee under the provision of the deed of trust, auctioned off the property at a trustee's sale to one John Thompson, the highest and best bidder, for four hundred and eighty-five (485) dollars, and the property was knocked down to him. The sheriff entered a memorandum of the sale in his sale book.

About a week or ten days after the sale Thompson requested the sheriff to make a deed to him and the sheriff made out the deed and was at all times willing and ready to deliver the same, but Thompson refused on demand of the sheriff to pay the purchase price.

The policy contained a provision as follows:

"If the interest of the assured be or become other than the entire, unconditional, and sole ownership of

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the property; or if a building insured be on ground not owned by the assured in fee simple; or if this policy be assigned; then and in every such case this policy shall be void, unless otherwise provided by agreement endorsed hereon."

Defendant refused to pay the insurance and suit was brought by plaintiff. The court directed a verdict for plaintiff and defendant has appealed.

It is defendant's contention that by reason of the foreclosure proceedings that the interest of the assured became other than "the entire, unconditional, and sole ownership of the property." Whether there could be such a change of interest before the title passed to the purchaser at the foreclosure sale by the receipt of the money from the purchases and the delivery of a deed to him by the sheriff, we need not say, for the reason that even if we put the construction upon the clause quoted that defendant apparently contends for, we do not think that there was a change of interest. In order for there to have been a change of interest there must have been something done by the sheriff or the bidder at the time of the trustee's sale at least sufficient upon which to enforce an action for specific performance. [Moseley v. Ins. Co., 109 Mo. App. 464.]

Conceding that the memorandum made by the sheriff in his sales book was a sufficient memorandum to take the sale out of the statute frauds, as is claimed by the defendant, we do not think that under the circumstances Thompson was bound by the sale. If neither the sheriff nor Thompson is bound, there was no change of interest in the property and plaintiff is entitled, of course, to set up anything tending to show that there was no change of such interest. There is nothing appearing in connection with the trustee's sale to bind Thompson, the bidder. There is no showing that any memorandum of the transaction was made or signed by him, but defendant contends, as we understand it, that the memorandum made by the sheriff was

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binding upon Thompson. Of course, this could not be true because the sheriff was not the agent of Thompson. [Dunham v. Hartman, 153 Mo. 625; Hall v. Giesing, 178 Mo. App. l. c. 236.] Thompson, the bidder, not only refused on demand to pay the purchase price when the sheriff was willing and ready to give the trustee's deed, but he had failed to pay the purchase price and to carry out his contract when this suit was brought, and there is no suggestion in the evidence that he intended ever to consummate the sale, but it is to be presumed that he had no such intention. A part of what he had purchased was gone, having been destroyed by fire, and he was not legally required to take the property and had refused to do so. Under such circumstances it would be unjust to deprive plaintiff of the insurance as it is apparent that the loss would fall upon her alone. Under the circumstances it is not apparent that there has been a change of interest.

There is nothing in defendant's contention that plaintiff should have pleaded the Statute of Frauds in her reply in order to have raised the point at the trial. The answer sets up that the property was sold at a trustee's sale and that thereby the interest and title of assured had been changed. The answer having stated that there had been a sale, the presumption is that it intends to say that the sale was made and evidenced in a form to constitute a legal sale and that all matters connected therewith were required so to be, and plaintiff, under the general denial contained in her reply, could object to any offer to prove by oral testimony things that were required to be in writing. [Ming v. Oleter, 195 Mo. 460; Beckman v. Mepham, 97 Mo. App. 161; Boyd v. Paul, 125 Mo. 9; Hillman v. Allen, 145 Mo. 638; Van Idour v. Nelson, 60 Mo. App. 523; Glasgow Milling Co. v. Burgher, 122 Mo. App. 14.]

There was no evidence that the fire was caused by any act or connivance of the plaintiff.

The judgment is affirmed. All concur.

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JEWELL MALOTT, by her Next Friend, LULA MALOTT, Appellant, v. FORD F. HARVEY and ROBERT J. DUNHAM, Receivers of the METROPOLITAN STREET RAILWAY COMPANY, Respondents.

Kansas City Court of Appeals, June 10, 1918.

1. **NEGLIGENCE: Street Railways: Minors.** The plaintiff, a minor, sued by her next friend to recover damages for injuries received when she was struck by the defendant's street car. She passed over the northbound track and almost cleared the southbound track when a street car came up behind her from the south and struck her with its northeast corner knocking her violently to the pavement and injurying her. *Held*, that the court erred in not submitting to the jury the question of whether or not the motorman saw the plaintiff in time to have avoided the injury.

2. ———: ———: ———. Where a child of tender years goes into danger, and the motorman saw her and could reasonably have avoided the injury but did not do so, or in other words the motorman's negligence was subsequent to that of the child, and therefore the proximate cause of the injury, even under the Kansas rule, this should have been submitted to the jury.

Appeal from Jackson Circuit court.—*Hon. Daniel E. Bird*, Judge.

REVERSED AND REMANDED.

Yates & Goble for the appellant.

Roscoe P. Conklin for the respondents.

TRIMBLE, J.—Plaintiff, a little girl seven years old, was going diagonally across Tenth street in Kansas City, Kansas, carrying some groceries in her arms, walking in a northeast direction and looking to the north. She passed over the west, or northbound, track of the defendant's street railway and had almost cleared the track when a street car came behind her

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from the south and struck her with its northeast corner knocking her violently to the pavement and injuring her. She brought this suit by next friend to recover damages.

The petition charged that the operatives of the car "negligently caused, suffered or permitted said car to run into and against plaintiff . . . when they saw plaintiff approaching; close to; upon the track upon which said car was running and in a position of peril and oblivious to the presence of said car, in time thereafter by the exercise of ordinary care to have stopped said car or slackened the speed thereof or to have warned plaintiff of the approach thereof and avoided running into and injuring plaintiff but negligently failed to do so."

Aside from admitting the official character and *status* of the receivers, the answer was a general denial followed by this paragraph:

"Further answering said petition, defendants say that it is, and was at all the dates mentioned in plaintiff's petition, the law of the State of Kansas, as declared by the Supreme Court of the State of Kansas, which is the court of the last resort in said State, that there is no duty upon the motorman of a street car to begin to stop the same, until he actually sees a person upon the track or about to go upon the track into a position of peril. Such rule is announced to be the law, by the Supreme Court of the State of Kansas, in the following cases, as reported in the official reports of said court: Dyerson v. Ry. Co., 74 Kansas, 528; Railway v. Bentley, 78 Kansas, 221; Himmelwright v. Baker, 82 Kansas, 569; Marple v. Ry. Co., 85 Kansas, 705; Coleman v. Ry. Co., 87 Kansas; 190; Dunlap v. Ry. Co., 87 Kansas, 197. Wherefore, having fully answered, the defendants pray to be dismissed with their costs."

The reply was a general denial.

At the close of plaintiff's evidence the defendant offered a demurrer which was overruled. The de-

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fendant thereupon offered in evidence the decisions cited in its answer. These were objected to by plaintiff as being outside the issues, because the laws of Kansas were not pleaded in the petition or in the answer and were not properly pleaded by defendant. These objections were overruled. The defendant offered no futher testimony but renewed its demurrer. Whereupon, the court announced that it was going to rule, and would hold, that, under the Kansas decisions in evidence, the plaintiff had not made a case and the demurrer to the evidence would have to be sustained. In view of this, plaintiff took an involuntary nonsuit with leave to move to set the same aside. This motion being duly filed and overruled, plaintiff brought the case here by appeal.

In Miller v. Chinn, 195 S. W. 552, 554, it was ruled that in pleading foreign decisions pertinent parts thereof should be alleged so as to avoid the charge that mere conclusions of law were stated. And in Gibson v. Chicago Great Western Railway Co., 225 Mo. 473, 484-5, and in Wentz v. Chicago, Burlington & Quincy R. Co., 259 Mo. 450, 465, it is held that foreign laws "must be pleaded with the same certainty that any other extrinsic fact must be pleaded which is essential to a right of action or to constitute a defense;" and such pleadings should "not merely state conclusions of what counsel think they (the foreign laws) mean." It is a very serious question whether the answer sufficiently pleads the foreign decisions under the above rule. It would seem to be merely the pleader's conclusion that said decisions announce the rule that "there is no duty upon the motorman of a street car to begin to stop the same until he actually sees a person upon the track or about to go upon the track into a position of peril." And certainly there is no allegation of facts which would enable such foreign rule to constitute a defense to a petition which charged (as this one does) that the motorman saw plaintiff approaching, close

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to, and upon the track, in a position of peril and oblivious to the car.

But inasmuch as the court acted upon the answer as sufficient and disposed of the case in accordance therewith, we need not pass upon the question of whether the answer was sufficient or not but will dispose of the case upon the theory that the answer was sufficient to bring to the court's attention the alleged rule in force in the jurisdiction where plaintiff's cause of action arose.

The action of the court was tantamount to holding that in no conceivable theory under the pleadings and the evidence could the jury find the motorman negligent and the defendants liable therefor. Now, even if the Kansas cases announce the rule as contended for by defendants, they do not reach far enough if the evidence is such that the *jury could reasonably find* that after plaintiff had gotten on the track and was in a place of danger, the motorman actually saw her and could reasonably have avoided injuring her and failed to make any effort to do so. Then again, the Kansas cases relied upon are all cases where plaintiff was an *adult* exposed to the full force of a charge of contributory negligence. In the main case, Dyerson v. Union Pacific R. Co., 74 Kan. 528, 533, the Supreme Court of Kansas manifestly recognizes that if negligence is not to be imputed to the plaintiff therein, the rule would not apply, by refuting the claim that negligence could not be imputed to him in that case. In the case of Kansas Pacific Ry. Co. v. Whipple, 39 Kans. 531, 540, the court held that, had the plaintiff been "an adult we might perhaps say as a matter of law, upon the facts disclosed by the trial, that he could not recover. [Citing cases.] But the party injured was not an adult; he was only a little boy in his ninth year of age." . . . "As the engineer knew of the presence of the boy upon the track as the engine was about crossing Main street, and as he must have known when he

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saw him that he was a boy of tender age and not so capable of taking care of himself as an older person or an adult, he should have brought to bear, for the safety of the boy and his undeveloped judgment, the exercise of adult judgment and caution to prevent his being run over. If the boy had not been seen by the engineer upon the track, or if he had been seen too late to avert the accident, then an entirely different question would be presented for our determination."

The evidence discloses nothing as to the experience, intelligence or capacity of the plaintiff in the case at bar beyond the fact that she was seven years old and had been entrusted with groceries to carry home. Hence negligence cannot be imputed to her as a matter of law. [Watson v. Southern Ry., 44 S. E. 375; Chicago Northwestern Ry. Co. v. Jamieson, 112 Ill. App. 69; Fritsch v. New York and Queens County Ry. Co., 87 N. Y. Supp. 942; Riley v. Salt Lake Rapid Transit Co., 37 Pac. 681] The theory upon which the Kansas rule rests is that if the negligence of the defendant and of the injured plaintiff is concurrent and exists up to the time of the injury, both have caused it and the plaintiff cannot recover. From which it logically would follow that if a plaintiff is of such tender years that contributory negligence is not to be imputed, the rule would not apply, at least where the defendant actually saw the plaintiff and her danger.

There is another view which would seem to make the question of the defendants' liability one for the jury even if the Kansas rule shall be applied in its full strictness. The plaintiff was on a paved street and had a right to travel thereon and to be where she was. [Seiffert v. Schaible, 103 Pac. (Kan.) 529.] She was not a trespasser, and the motorman could expect persons to be on the street, and therefore it was his duty to watch. She was going *diagonally* across the street. Consequently her negligence, if

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any, was in entering upon the track without looking for or observing the approach of a car from the south. An adult, who was watching her, thought she had time to get across even going in the direction she was. We think there is room for the finding that after she negligently got into danger, the motorman saw her and could reasonably have avoided the injury but did not do so. Or, in other words, that his negligence was subsequent to hers and was therefore a proximate cause of the injury even under the Kansas rule in its full force. In Dyerson v. Railroad, supra, p. 534, it is said: "There is a general agreement in the authorities that where an engineer actually sees a person in a position of danger, and then fails to do what he reasonably can to prevent an accident, the railroad company is responsible for the resulting injury, irrespective of the question of contributory negligence." And in Marple v. Topeka Railway Co., 85 Kans. 699, 706, it is said: "It is true, as stated in the opinion in the Dyerson case (74 Kans. 528, 534), that a different principle would apply if the motorman actually saw the deceased in an exposed position of danger in time to have averted the injury."

There was evidence from which the jury could find that the motorman saw the little girl. There was nothing in the street to hinder his sight. He was looking straight ahead and there was no reason why he did not see as it was his duty to do. There is evidence that the distance between the west curb and the west rail was sixteen feet, also evidence that this distance was only twelve feet, nine inches, since it was the same as on the east side of the street the railway being in the center. There was evidence that the little girl was midway between the west curb and the west rail (that is, eight feet, or six feet three inches, from the track), when the car was seventy-five feet away and that when she got upon the track the car was fifty feet away, other evidence put it at thirty feet away. The little girl was going "just

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about like a kid would walk." There was evidence that the car was going five or six miles an hour and that the car could have been stopped in twelve feet at six miles per hour or seventeen feet if going seven miles per hour; that a move of the handle, or perhaps two moves, according to whether the power was on or off at a place slightly down grade, would have accomplished the result; and that nothing whatever was done to stop or slacken the speed of the car. During all the time above mentioned, the little girl with her arms full of groceries was walking with her face to the north approaching the rails without hesitation and walking diagonally thereover. It is not clear how far *along* the track she went, but the evidence is ample to justify the jury in finding that the motorman saw her. [Johnson v. Atchinson, Topeka and Santa Fe Ry. Co., 56 Kan. 263.]

In our opinion the evidence afforded ample room for the submission of the case to the jury on a proper theory and hence the opportunity to submit the case upon a theory properly justified under the law and the evidence should not have been denied to plaintiff. The judgment is, therefore, reversed and the cause remanded for a new trial. And we make the same suggestion as was made in Miller v. Chinn, supra. All concur.

A. M. DAVIS, Respondent, v. THE KANSAS CITY RAILWAYS COMPANY, Appellant.

Kansas City Court of Appeals, June 10, 1918.

INSTRUCTIONS: Street Railways: Rate of Speed. Where the plaintiff's instruction to the jury is erroneous, but such error is afterwards cured by the defendant's instruction, which fully explained the plaintiff's instruction so that the jury could not have been mislead, it will not constitute reversible error.

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Appeal from Jackson Circuit Court.—*Hon. T. J. Seehorn*, Judge.

AFFIRMED.

Bird & Pope and *Rush L. Fisette* for respondent.

Clyde Taylor for appellant.

BLAND J.—This is an action for personal injuries. Plaintiff having recovered a verdict and judgment in the sum of twenty-five hundred ($2500) dollars, defendant has appealed. The petition alleged that the car was being so operated "that it was caused or permitted to run into and strike said wagon and cause plaintiff to be thrown therefrom and injured as aforesaid; in that said car at said time and place was being run at a high and reckless rate of speed, to-wit, from fifteen to twenty miles an hour, and in disregard of the fact that persons and vehicles, including the vehicle and wagon plaintiff was seated in, were liable to be and were on or near said track ahead of said car," etc.

Plaintiff's instruction P-1, which directed a verdict for him, told the jury that if "said car was at said time and place being negligently run by defendant at a high and reckless rate of speed, and in disregard of the fact that wagons and horses were reasonably certain to be upon said track," etc., they should find for the plaintiff. Plaintiff's evidence showed that the car was being operated at more than twenty miles per hour but there was evidence on the part of defendant that the car was being operated only at eleven miles per hour. This instruction was erroneous because it ignored the limits of speed specified in the petition. [Hogland v. Dunham, 186 S. W. 1145; Moore v. Railway, 142 Mo. App. l. c. 294, 295.] However, plaintiff's instruction was cured by defendant's instruction D-6, which told the jury "that if the street car, at and immediately prior to the collision

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with the wagon, was not running at a rate of speed which was in excess of fifteen miles per hour," etc., they should find for the defendant.

Defendant insists that its instruction D-6 did not cure the error contained in plaintiff's instruction P-1, citing in support thereof State ex rel. Long v. Ellison, 199 S. W. 984, and similar cases. In the case cited plaintiff's instruction that directed a verdict for her left out one of the elements necessary for the jury to find in order for her to recover. No such situation appears in this case. The gravamen of the charge in the petition is that the car was "being run at a high and reckless rate of speed." What was a high and reckless rate of speed under the circumstances was limited in the petition to a rate of speed in excess of fifteen to twenty miles per hour, and as plaintiff's instruction P-1 failed to so limit the high and reckless rate of speed therein mentioned, it was erroneous, but what was meant by a high and reckless rate of speed (in other words, the definition or qualification of it as given in the petition) might have been given in any other instruction the same as any other definition or explanation of language used in the instruction complained of might have been given. The language used in defendant's instruction D-6 was tantamount to a statement that a speed not in excess of fifteen miles per hour was not a high and reckless rate of speed and that one in excess of fifteen miles per hour was such (Hoglaňd v. Dunham, supra), and having given a correct definition of, or fully explained, what constituted a high and dangerous rate of speed under the circumstances, the jury could not have been misled as they were required to read together all the instructions given by the court. [Holeman v. City of Macon, 177 S. W. 1078.]

The judgment is affirmed. All concur.

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JOHN D. TAYLOR, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Kansas City Court of Appeals, June 10, 1918.

1. **TELEGRAPH AND TELEPHONES: Damages: Interstate Commerce.** The plaintiff sued to recover damages for the delay by the defendant in transmitting a telegram. There were two routes by which a telegram could be transmitted from Kansas City to Triplett, Missouri, one interstate and the other intrastate, but it was necessary to use a relay for both transmissions. The defendant transmitted the message through the interstate route, and the telegram was delayed several hours to the plaintiff's damage. *Held*, that since the message was transmitted as an interstate message, the defendant was not subject to the penalty as provided in section 3330, Revised Statutes 1909.

2. ———: ———: ———. The fact that the origin and destination of a telegam was in one certain State does not make the message or telegram an intrastate one when its course or route takes it out of the State.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,* Judge.

REVERSED.

John Taylor for respondent.

Mahan, Smith & Mahan for appellant.

BLAND J.—This is a suit to recover the penalty provided by section 3330, Revised Statutes 1909. The case was tried by the court without the aid of a jury and there being a judgment for plaintiff, defendant has appealed.

Plaintiff, at 6:25 A. M. of August 7, 1917, delivered to the defendant at its office in Kansas City, Missouri, a telegram addressed to Roy McKittrick, at Triplett, Missouri. The message was not delivered until 11:42 A. M. of the same day, to plaintiff's injury.

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Defendant's evidence tended to show that the usual, ordinary and customary way of routing messages from Kansas City, Missouri, to Triplett, Missouri, was through a relay station at Omaha, Nebraska. A relay station is one to which telegrams are sent as a distributing point to other places. Defendant's evidence shows that the relay station for Triplett was Omaha and a message sent from Kansas City is sent to Omaha and relayed thence to Triplett.

Plaintiff's evidence tended to show that there was a Western Union wire running from Kansas City to Brunswick, Missouri, and one from Brunswick to Triplett; that a message could be sent from Kansas City to Brunswick; that the operator at Brunswick could turn around in his chair and telegraph the message from Brunswick to Triplett, and that a message could also be sent from Kansas City to Chillicothe, Missouri, and from there telegraphed to Triplett. The distance from Kansas City to Brunswick is between ninety and ninety-two miles and from Brunswick to Triplett about seven miles. It is about two hundred miles from Triplett to Omaha and more than two hundred miles from Kansas City to Omaha. While the evidence shows that the route from Kansas City through Omaha to Triplett is longer than the one through Brunswick or Chillicothe to Triplett, the undisputed evidence shows that it does not take any longer to send a message a long distance than it does a short one. The company maintained several wires between Kansas City and Omaha and one wire from Omaha to Triplett.

Defendant urges that the message was interstate commerce and therefore not subject to the regulations of this State. Plaintiff urges that it would have been more convenient for defendant to have sent the message through Brunswick or Chillicothe to Triplett than through Omaha to Triplett, and at any rate that the sending of the message outside of the State was

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evidence of an effort to make it interstate commerce and to thus evade the laws of this State.

We have carefully examined the record and we do not find that there was any evidence that it was less convenient or took any greater time to send the message by Omaha than by way of Brunswick or Chillicothe. We do not attempt to say that defendant could avoid the effect of the penalty provided in the statute by purposely sending the message outside of the State in an effort to make it interstate commerce. This case does not present a situation of that kind. The evidence shows that defendant had a choice of two ways of sending the message, one as convenient as the other and requiring as little time as the other and, therefore, as direct as the other. There is nothing in the evidence from which a court or jury could say that defendant was attempting to avoid the statute mentioned. We could not go to the extent of holding that where a company has two routes over which a telegram could be sent, one an intrastate and the other an interstate route, each of equal convenience and requiring the same time, and therefore as direct, it must send the message over the intrastate route and not the interstate route, and that a failure to send it over the former is evidence of an intention to avoid the state statute. Of course, the fact that the origin and destination of the message was in the State of Missouri did not make the message an intrastate one when its course or route took it outside of the State. [Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617; Bateman v. Western Union Tel. Co., 93 S. E. 467 (N. C.); Western Union Tel. Co. v. Kaufman, 162 Pac. 708 (Ok.); Western Union Tel. Co. v. Bolling, 91 S. E. 154 (Va.); Western Union Tel. Co. v. Lee, 192 S. W. 70 (Ky.); Davis v. Western Union Tel. Co., decided by this court but not yet reported.]

Plaintiff calls our attention to the fact that this message was not sent from Kansas City directly to

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Omaha and thence to Triplett but was sent to St. Louis, Missouri, thence to Omaha, and thence to Triplett. Why the message took this course is not explained. The undisputed evidence shows that the message could have been sent directly from Kansas City to Omaha and thence to Triplett. The fact that it was sent by way of St. Louis does not show or indicate any effort of the defendant to avoid the statute mentioned, and as the message was sent to Triplett through another State it was clearly an interstate one and was not subject to the penalty provided in the statute.

The judgment is reversed. All concur.

CATHERINE MILLER, Respondent, v. FORD F. HARVEY and R. J. DUNHAM, Receivers of the METROPOLITAN STREET RAILWAY COMPANY, a Corporation, Appellants.

Kansas City Court of Appeals, June 10, 1918.

1. **NEGLIGENCE: Street Railways: Humanitarian Doctrine.** The plaintiff sued to recover damages from defendant for the negligent killing of her husband. The deceased was driving a wagon on a certain street, and while doing so, seeking to cross the street, was run into by defendants' street car and killed. The evidence tended to show that the motorman saw the deceased in a position of peril but failed to stop the street car in time to avoid the collision. *Held*, that in view of the facts that appeared in the evidence the motorman should have stopped the car, and that the defendants' demurrer to the evidence was properly overruled.

2. ———: **Instructions: Damages: Statutes.** Sections 5426-5427, Revised Statutes 1909, are remedial but under them aggravating circumstances may be taken into consideration and punitive damages allowed where there is shown to exist willfulness, malice and recklessness, etc. Section 5425, Revised Statutes 1909, is both penal and remedial and it is proper to instruct the jury in a case, under this section, that they may take into consideration all the facts and circumstances in evidence bearing upon the killing.

3. ———: ———: ———. Where a court gives instructions that assume disputed facts, such instructions will be held erroneous.

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Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney,* Judge.

REVERSED AND REMANDED.

Reinhardt, Schibsby & Muenich for respondent.

Clyde Taylor and *Chas. A. Stratton* for appellants.

BLAND, J.—This is an action for damages sustained by plaintiff on account of the killing of her husband on July 2, 1915. The case was pleaded and recovery was had upon the "humanitarian" or "last chance" doctrine.

Defendants' first point is that their demurrer to the evidence should have been sustained. Taken in its most favorable light to plaintiff, the evidence shows that on said date the deceased, a man sixty-nine years of age, while engaged in his business as a market gardener, stopped his wagon in front of a grocery store on the south side of Fifteenth Street, midway between Locust and Cherry Streets, in Kansas City, Missouri. The wagon was headed east. Deceased after having transacted his business in said store returned to his wagon, got upon the seat and immediately started up, pulling his horse toward the north and thence on to defendants' eastbound street car track. He did not look around but continued looking in the direction in which his wagon was going, to-wit, toward the north, and apparently oblivious of the fact that a car was approaching from the west. The distance between the curb and the first rail of the eastbound street car track was seventeen and one-half feet. The distance between the outer rails of the two tracks was fifteen feet. The evidence was that an ordinary horse is about eight feet in length. At the time deceased started his horse and wagon there was an eastbound street car proceeding upon the south track of the double tracks there present, at the rate of ten miles per hour, one hundred and thirty-

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two feet from the point where deceased drove upon said track. Plaintiff proceeded from the curb to the point of collision, north of where he started up his horse, at a speed described by one witness as a slow walk. Of course this might mean that deceased was proceeding at the rate of speed of even less than two or three miles per hour. However, he must have been proceeding at a rate of a little more than two miles per hour for the reasons hereinafter given.

When the front wheels of the wagon reached the middle of the eastbound track, the car struck the left front wheel throwing plaintiff from the wagon ten feet ahead of it on to the track. At that time the horse had cleared the eastbound track to the north and was uninjured. The car at no time slackened its speed before striking deceased.. After striking deceased the car ran one hundred feet before it was finally stopped. The evidence shows that deceased was yet alive on the track eighty feet east of the collision, for at that time he was between the front and rear trucks of the car and uttered a scream. Immediately after the car stopped the motorman backed it, one wheel again passing over the body of deceased. When the car finally stopped deceased was found dead between the north wheels of the front truck. A witness on the part of plaintiff testified that at the moment of the collision the motorman was leaving the front of the car. Another witness testified that when he looked up upon hearing the crash he saw the motorman and conductor standing back in the body of the car. At this time the conductor was evidently urging the motorman to return to his place of duty which the motorman did and was thereafter seen apparently moving an appliance, after which the car stopped within ten feet. When the car stopped the wagon was in front of it but neither it nor the horse was injured. The motorman testified that the horse and wagon while in front of the store was headed toward the east and that he viewed the

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deceased from that time until the time of the collision; that he did not think that deceased was in a position of peril until he, the motorman, was within thirty-five or forty feet of him, at which time deceased was going upon the track, "when the horse's head got on the rail." However, he did nothing to stop the car until he got within twenty feet of him. The evidence shows that the car was going down a grade of 4.01 feet. The motorman stated that the power was off and that he was coasting down the hill and that when he got within twenty feet of the deceased he set the emergency brake and locked the wheels and reversed the car but did not drop any sand. That this had the effect of locking the wheels; that the car was almost stopped when the wheels of the wagon "stuck up through the window glass." At that time he stepped back out of danger. He testified that the car stopped before he returned to the vestibule. He testified that under the circumstances the car could have been stopped within forty feet. There was other testimony that it could have been stopped in thirty feet. No gong was sounded nor warning given.

Under these circumstances defendants say their demurrer to the evidence should have been sustained, because, defendants say, that the time that elapsed between the time deceased got into a position of danger and the time of the collision was so short that the motorman had no chance in which to avoid the accident. With this we are unable to agree. Deceased was in peril before the horse's feet reached the first rail of the south tracks. [Ellis v. Railway, 234 Mo. l. c. 686.] Under the facts the jury could have found that the motorman saw deceased approaching a position of peril and oblivious thereof at the time deceased turned his horse toward the north to cross the track. The horse traveled seventeen and a half feet between the curb and the first rail and had gotten across the eastbound rails before the collision, there-

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fore he must have traveled seventeen and a half feet plus the distance between the eastbound track and his own length before the collision. If the eastbound tracks were five feet in width and the horse was eight feet in length, then the horse traveled thirty and a half feet between the time the jury might have found that the motorman saw deceased in a position of peril and oblivious thereof and the time the car struck the wagon. During this time the evidence shows that the car ran one hundred and thirty-two feet at the rate of ten miles per hour. If the car covered this space going at that rate of speed, the distance was covered in nine seconds. If the horse went thirty and a half feet while the car was going one hundred and thirty-two feet at ten miles per hour, or in nine seconds, then the horse was traveling at the rate of 2.31 miles per hour, and as the evidence was that the horse was going at a rate described as a slow walk, we may assume from all the evidence that it was proceeding at the rate of 2.31 miles per hour. The motorman could have stopped the car within thirty feet; he had one hundred and forty-two feet in which to stop it before striking deceased, as he ran ten feet before running over deceased after the collision with the wagon. Under these circumstances the motorman had more than nine seconds in which to take in the situation, coordinate his muscles and stop the car. The car was equipped with all the latest appliances for stopping cars. It required but a moment for the motorman to begin to use the appliances for that purpose. There is no question but under the evidence the motorman could have stopped the car before it ran over deceased, and if the facts that are assumed herein appear at the next trial the demurrer to the evidence should be overruled.

Defendants complain of the giving by the court of plaintiff's instruction No. 5. This instruction reads as follows:

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"The court instructs the jury that if you find for the plaintiff you shall allow her a sum not less than $2000 and not more than $10,000, in the discreation of the jury, and in determining the amount you will allow her you may take into consideration the pecuniary loss occasioned to the plaintiff by the death of her husband, and you may also take into consideration all the facts and circumstances in evidence bearing upon the killing of plaintiff's husband."

It is defendants' contention that under the rule laid down in the case of State ex rel. v. Ellison, 195 S. W. l. c. 725, this instruction permits the jury to award plaintiff punitive damages and that such damages were neither pleaded nor proved. This contention is not well taken. This suit was brought under section 5425, Revised Statutes 1909. The suit under consideration in the case cited was brought under sections 5426-5427, Revised Statutes 1909. The sections under consideration in that case allow the recovery of compensatory damages. This has always been the ruling although aggravating circumstances may be taken into consideration and punitive damages allowed under these sections where there is shown to exist willfulness, malice and recklessness, etc. (Troll v. Gas Light Company, 182 Mo. App. l. c. 608; Johnson v. Mining Co., 171 Mo. App. 141), section 5425 is both penal and remedial (Boyd v. Railroad, 236 Mo. 54) and it is proper in a case under that section to instruct the jury that they may take into consideration the facts and circumstances in evidence bearing upon the killing. An instruction of this kind has been repeatedly approved. [Foster v. West, 194 Mo. App. l. c. 105; Kiser v. Met. St. Ry. Co., 188 Mo. App. 169; Loomis v. Railroad, 188 Mo. App. 203; Baldwin v. Harvey, 191 Mo. App. 233; Holmes v. Railroad, 176 S. W. 1041; Roberts v. Trunk, 179 Mo. App. 358; Harding v. Railroad, 248 Mo. 663; Boyd v. Railroad, supra.]

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Defendants complain of the giving by the court of plaintiff's instructions Numbers 2 and 3. Plaintiff's instruction Number 2 told the jury that if the motorman could have avoided the collision by the "use of his warning gong" after he saw or could have seen that deceased intended to go upon the track, that their verdict should be for plaintiff. Plaintiff's instruction Number 3 told the jury that if the motorman could by the use of the means at hand have avoided killing deceased by slackening or stopping the car after he saw that a collision was likely, their verdict should be for the plaintiff. It is to be noticed that both of these instructions directed a verdict for plaintiff but failed to have the jury find that plaintiff was oblivious to his peril. Of course, if deceased was not oblivious of his peril but looked and saw the approaching car and willfully drove upon the track, then plaintiff was not entitled to recover. However, plaintiff contends that there is no issue as to obliviousness in the case as plaintiff says the case was pleaded and tried upon the theory that deceased was at all times in a position of peril and oblivious thereof. To this we cannot agree. Defendant introduced evidence tending to show that the motorman was ringing his bell all the time after he left Locust Street, or a distance of one hundred and thirty-two feet before deceased was struck; that deceased was seen by one witness, upon the wagon, after deceased came out from the store and that the latter "got on the seat and grabbed hold of the lines and pulled his horse right across the rail right in front of the car. When the motorman began pounding his bell as hard as he could, the driver began hitting the horse with the lines and jerked it to hurry the horse up. The horse made a lunge after that to the north. The car struck the wagon right at the front wheel." Another witness testified that "the driver struck his horse as he started to cross the track—tried to hurry on." This evidence taken in its most favorable light to defend-

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ants shows that when the motorman began ringing his bell one hundred and thirty-two feet away, or at the time deceased left the sidewalk on his wagon, deceased heard the gong and began hitting the horse with the lines and jerked it to hurry the horse on across the track. There was other evidence that deceased drove on the track so near the car that the motorman had no chance to avoid the collision. Of course, all these facts were denied by plaintiff's testimony but in view of defendants' testimony tending to show that deceased was not oblivious to his peril, that element should not have been assumed as a fact in plaintiff's instructions and the court erred in giving them. We also think that other parts of these instructions assumed as a fact that deceased went upon the track without looking for or becoming aware of the car.

The other points made against the instructions are not well taken. The evidence was such that the failure to ring the gong was properly submitted. There was sufficient evidence of probative force to go to the jury as to whether or not the gong was rung. It is true that many of defendants' witnesses testified that it was and many others on the part of plaintiff testified that they did not hear it. Plaintiff's witnesses testified that they did not anticipate anything unusual and were not listening for the gong, but many of them stated that they heard the crash and one of them that he heard the scream of a woman in the car. This shows that plaintiff's witnesses were in a position to hear and did hear, for they heard the scream and the crash and if these were heard by them, it is fair to assume that they would hear the sounding of a loud gong if one were rung. Where witnesses of equal credit give positive evidence that a signal was given their testimony is, as a general rule, of more weight than that of witnesses who say that they did not hear it, but much depends upon the position, attention and credibility of the witnesses, and

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the ultimate question, whether the signal was given or not, is usually one for the jury. [Dutcher v. Railroad, 241 Mo. 137; Hanlon v. The Mo. Pac. Ry. Co., 104 Mo. 381; Murray v. The Mo. Pac. Ry. Co., 101 Mo. 235.] Whether or not plaintiff's witnesses could or could not hear the alarm given by the gong on the car was under the facts and circumstances clearly for the jury.

We have examined defendants' objections to the giving and refusal of other instructions and find no merit in them. Defendants raise various points as to the admission of testimony. There was no error in permitting plaintiff to show that the motorman left his post of duty and after finally stopping the car backed it over deceased. This evidence was a part of the *res gestae* and threw some light on the negligence of the motorman in failing to stop the car and to avoid the accident as alleged in the petition. Other objections to the admission of evidence need not be passed upon as they can be easily met and will probably not come up at another trial.

The judgment is reversed and the cause remanded. All concur.

O. H. NELSON, Respondent, v. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 10, 1918.

1. **WAGES: Interstate Carrier: Overtime.** The plaintiff sued to recover wages from defendant, under the Adamson eight-hour law the amount of overtime from January 1, 1917, to May 19, 1917. The case was tried on an agreed statement of facts, the defendant contending that the act did not apply to the plaintiff's contract of employment. *Held*, that the plaintiff was entitled to recover for the excess time figured correctly on the *pro rata* basis of the contract rate for regular time.

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2. ———: ———: ———. The Adamson Law merely substituted eight hours of labor as a day's work for the purpose of measuring the plaintiff's compensation as necessary for day's wage, with further requirement that he should not receive, for said eight hours' labor less that he had received for his specified day's task, and if it necessarily required more than eight hours to perform the specified task he should be paid *pro rata* for overtime.

Appeal from Buchanan Circuit Court.—*Hon. L. A. Vories,* Judge.

AFFIRMED.

Culver & Phillip for respondent.

R. A. Brown for appellant.

TRIMBLE, J.—Plaintiff, an employee engaged in the operation of defendant's interstate passenger train, brought this suit to recover overtime compensation claimed to be due under the Act of Congress of September 3, 5, 1916, known as the Adamson Law. [39 U. S. Stats. 721, c. 436.]

So far as applicable to this case, said Act provides that beginning January 1, 1917 "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed" by any railroad interstate carrier (with certain exceptions not material to this case) "and who are now or may hereafter be actually engaged in any capacity in the operation of trains" in interstate and foreign commerce.

Section 2 of said Act provides for the appointment of a commission by the President to observe the operation and effects of the institution of the eight-hour standard workday, during a period of not less than six nor more than nine months, and to report in thirty days thereafter.

Section 3 provides that pending said report, and for a period of thirty days thereafter, the compensation

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of railway employees subject to the Act for a standard eight-hour workday should not be reduced below the present standard day's wage "and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the *pro rata* rate for such standard eight-hour workday."

Plaintiff's contract of employment was made in December, 1916, that is, after the Act was passed; and the services for which overtime compensation is herein sought were rendered between January 1, and May 19, 1917. So that no question of plaintiff's right to recover can arise over the character of plaintiff's services or the period during which they were rendered or the *status* of the defendant as an interstate carrier subject to the Act. The sole contention made by defendant is that the Act does not apply to plaintiff's contract of employment. Defendant bases this contention upon the fact that there is no provision in the contract for overtime compensation nor clause defining what shall constitute "a day's work," and upon the claim that the contract fixed plaintiff's compensation at a stipulated sum per calendar month. The contention, in reality, rests wholly upon this last claim. For, the absence of any express provision in the contract relating to overtime compensation or defining a day's work must be deemed to have been urged only in emphasis of the last claim or to exclude the possibility of the Act being made applicable by the wording of the contract elsewhere and aside from that portion thereof relating to the specified compensation and how it should be paid. The contract having been made after the enactment of the law, and the services having been rendered after it had gone into effect, the *mere absence* of any provision in the contract calling for overtime pay or of any provision specifying what should constitute a day's work, cannot alone defeat plaintiff's right, since the law would supply the place of such absent provisions, unless it is clearly inapplicable to the contract on account of the other reason given, namely, the claim that the contract can in no

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way be so regarded or interpreted as to permit the ascertainment of a day's wage, but must be deemed to have fixed plaintiff's compensation at a stipulated sum per calendar month. It is thus seen that defendant's contention comes down to the proposition that the Adamson Law affects only such contracts as refer to a day's work or a day's pay and merely provides that, in such contracts, a standard day of eight hours shall be understood instead of the theretofore existing standard day; and that where, under his existing contract of employment, an employer's compensation was not reckoned on the basis of "a standard day" nor with reference to a day's work, there is nothing in his contract to which the new standard could be applied and, therefore, the rate of compensation is not affected by the Act.

It is true that the Act neither abrogates existing contracts nor makes new ones, and it may very well be that if an employee makes a contract to which it is impossible to apply the law, then the employee may not be able to claim any benefits under that law. But it cannot be successfully maintained that there is anything in the wording of the Act showing that the *intention* was that the law should apply to some and not to all. The Act fixes eight hours "as the measure or standard of a day's work for the purpose of reckoning the compensation for services of *all* employees" engaged in the movement of interstate trains. And there is nothing elsewhere in the Act which can be construed as creating any distinction between employees so engaged, whether their contracts provide they are to be paid a certain rate per month, per mile, per day, or per run.

Neither is there anything in the circumstances under which the Act was passed or in the purposes sought to be accomplished by it, to justify the inference that there is any such distinction to be made in applying the Act to the various contracts of such employees. The circumstances calling for the Act and the purposes of its enactment are set forth in the decision of the

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United States Supreme Court, in Wilson v. New, 243 U. S. 332, wherein the constitutionality of the law is upheld. These were that two systems, concerning the wages of employees engaged in the movement of interstate trains, were in operation at and prior to the passage of the Act. One, in force upon about fifteen per cent of the railroads, had an eight-hour standard of work and wages with additional pay for overtime; the other, in force on eighty-five per cent of the roads, required a stated mileage task of one hundred miles to be accomplished in ten hours with extra pay for any excess beyond that time. The organizations representing the employees demanded that a hundred-mile task be fixed for eight hours instead of ten, the employees to receive the same compensation for the eight hours as they had received for the ten with extra compensation, calculated at an increased rate, for overtime; that is, the time they were employed above the eight hours in performing their daily task. This demand, along with certain other requirements in relation thereto, was refused by the employers and a great strike was threatened. To avert this, and to avoid paralyzing the commerce of the nation, the Adamson Act was passed. It stepped in between the disputing parties and fixed an eight-hour standard day for work and wages, not fixing the amount of the task to be done in that time, but leaving the parties to determine that; and, while refusing to concede some of the things demanded by each side and granting others, the Act provided that while the dispute lasted, the pay for overtime "necessary" in the accomplishment of the specified task should be not less than the *pro rata* rate or, in other words, the overtime pay was confined to the regular rate. The law was not only made obligatory on both parties, but it fixed the wages during the period of their dispute by prohibiting a lower rate of wages under the new system than was paid under the old. So that the effect of the Act was to require the employer to permit the employee to per-

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form the stipulated task in eight hours instead of ten for the same compensation he had theretofore received for ten hours work, and, if it necessarily required more than eight hours' time, the employee was to be paid *pro rata* for the overtime. Such being the circumstances under which the Act was passed and the purpose for which it was enacted, there is no reason why it should not apply, as the terms of the Act expressly say it shall apply, to *all* employees so engaged, unless indeed the terms of the contract of employment unequivocally and affirmatively show that it is one to which it is impossible to apply the law because not dealing in any manner with the things established by the law. Any other view would tend to curtail the operation of the law and prevent the accomplishment of the very purpose for which it was passed.

It only remains then to see whether plaintiff's contract is of such a nature that it is impossible to apply the law to it.

The case was tried upon an agreed statement of facts, and from this it appears that plaintiff's run was from St. Joseph, Missouri, to Grand Island, Nebraska and vice versa, a distance of two hundred and fifty-two miles; that the above run was to be "his day's work," both when he worked in the daytime and when he worked at night; that he was to make two round trips between the points aforesaid and then "lay over" one day, which means that he was to work four days out of every five in the month; that he was to be paid "*at the rate of*" $82.50 per month. Having to work four days out of every five in the month, it follows that he was required to work twenty-four days in January, twenty-two in February, twenty-five in March and twenty-four days each in April and May, and for these respective number of days in each month he was to get $82.50; and his compensation for each day's work could be determined by dividing $82.50 by the number of days he was required to work in any particular month. So that not only did the contract provide what his day's work should be (a run of

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two hundred and fifty-two miles), but it afforded a basis from which his compensation for doing each day's work could be reckoned. Not only that, but "Schedule A" kept by defendant showing the days plaintiff worked between January 1, 1917, and May 19, 1917, both inclusive, the "lay over" days, the time at which he left and arrived at St. Joseph, the time he left and arrived at Grand Island, also contained a column headed "Rate per day per cal. Mo.," and in this column was stated the daily wage plaintiff was entitled to receive and which he was paid for each day he actually worked. Said schedule also showed the number of hours and fractions thereof plaintiff was necessarily engaged each day over the standard eight hours. And this schedule shows also that plaintiff's compensation was calculated and paid *per day*. Clearly, plaintiff's contract furnished the data from which his daily wage could be, and was, ascertained. The contract specified a run of two hundred and fifty-two miles as a day's work for which he was to receive a compensation which was easily computable, and was in fact computed, in terms of a daily wage. The Adamson Law merely substituted eight hours labor as a day's work for the purpose of measuring plaintiff's compensation for what the contract specified as necessary for a day's wage, with a further requirement that he should not receive, for said eight hours labor, less than he had received for his specified day's task, and if it necessarily required more than eight hours to perform the specified task he should be paid *pro rata* for the overtime.

We are unable to see any difficulty, much less impossibility, in applying the Adamson Law to plaintiff's contract, nor reason why it should be held to be outside of and beyond the operation of said law.

There is no question as to the amount of overtime plaintiff was necessarily employed during the time for which he sued, except for the thirty minutes' time occupied in "preparatory service" before the

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train left on each trip. There is no question but that he performed this thirty minutes preparatory service at and just prior to starting on each trip. This was work that was required and necessary in order to make the trip, as much so as the actual running of the train itself. Such being the case, this thirty minutes "preparatory service" was as much within the provisions of section 3 of the Act requiring the employee to be paid *"for all necessary time in excess of eight hours,"* as any other time occupied in doing the work of running the train.

We think the judgment of the trial court, which was for the excess time figured correctly on the *pro rata* basis of the contract rate for the regular time, should be affirmed and it is so ordered. All concur.

L. G. LEBRECHT, Appellant, v. NEW STATE BANK, WOODARD, OKLAHOMA, Respondent.

Kansas City Court of Appeals, June 10, 1918.

1. **BANKS AND BANKING: Deposits: Capital Impaired.** Under the Oklahoma law, a bank is deemed to be insolvent when the actual cash market value of its assets is insufficient to pay its liabilities, when it is unable to meet the demands of its creditors in the usual and customary manner, and when it shall fail to make good its reserve as required by law. The losses sustained by a bank are charged first to its undivided profits and then to its surplus. A bank's capital stock is impaired when its losses exceed its undivided profits and its surplus.

2. **———: Pleading and Proof.** A defendant cannot plead in defense one contract and offer in evidence a totally different one.

3. **———: ———: ———: If under a written contract, a bank commissioner's obligation to return plaintiff's money is already fixed, the promise to perform that obligation could not support a new promise made by plaintiff, because there would be no new consideration for that promise.**

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4. **INSTRUCTIONS: Pleading and Proof.** A defense which is based upon a contract different from the one stated in the pleading, and a case is presented upon this theory, over the plaintiff's objection, all instructions which related to the evidence offered are erroneous.

Appeal from Jackson Circuit Court.—*Hon. Willaim O. Thomas*, Judge.

REVERSED AND REMANDED.

Hal R. Lebrecht and *M. Schwind* for appellant.

McCune, Caldwell & Downing for respondent.

TRIMBLE J.—This action is to recover $2300 claimed as the balance due on a deposit of $10,000 made by plaintiff with the defendant bank. The petition alleges that on the 8th of October, 1916, said bank received from plaintiff as its depositor the sum of $10,000 which was credited to plaintiff's account; that on December 5, 1916, plaintiff drew his check thereon for $10,000, payment of which was refused, and defendant doth still refuse to pay same, or any part thereof, except the sum of $7700, leaving $2300 due with interest thereon at the legal rate from said December 5; for which, judgment is asked.

The answer, after a general denial, set up that on September 25, 1916, plaintiff was the owner of 91 out of a total of 150 shares of the capital stock of said bank; that the bank was then in the hands of the Oklahoma Bank Commission because of the wrongful conduct of Murphy, the cashier, in making unsafe and fictitious loans and in misappropriating its funds, and the Bank Commissioner was threatening to liquidate the bank and wind up its affairs as he was empowered under the law to do.

That on said date plaintiff entered into a contract with said Bank Commissioner whereby the former agreed to deliver to the latter $10,000 to be used in reimbursing and securing said bank against any losses

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caused to defendant by the wrongful acts of said Murphy as cashier "and to be applied *pro tanto* in reimbursement for any misappropriations or wrongful withdrawals of funds from defendant by said Murphy, and to be returned to plaintiff, subject to any deductions for such purposes, only with the approval of said Bank Commissioner, in consideration of which said Lankford, as such Bank Commissioner, acting under the laws of the State of Oklahoma, agreed to permit and did permit the defendant to be reopened and continue in business, without being dissolved and liquidated, and its affairs wound up, as said Lankford might have insisted upon being done.

The answer further alleged that pursuant to said contract plaintiff delivered said $10,000 to the Bank Commissioner and he deposited same with defendant subject to the commissioner's orders and thereupon permitted the bank to be reopened and continue in business to plaintiff's great benefit, enabling the latter to afterwards sell all of his stock in the bank as an active and going concern; that thereafter it was discovered that Murphy, the cashier, had wrongfully issued a negotiable cashier's check of defendant in the sum of $2300 which was negotiated to a holder in due course who was entitled to enforce payment of same against defendant.

The answer then alleged that "thereafter, plaintiff made demand upon said Lankford for the return of the said $10,000 and the said Lankford agreed to return $7700 thereof immediately and the balance upon plaintiff's securing the cancellation and surrender of said $2300 cashier's check without payment by defendant, which plaintiff then and there agreed to do, for the benefit of this defendant, and thereafter said Lankford returned to plaintiff said $7700."

"That nevertheless plaintiff failed to secure the cancellation and surrender of said cashier's check and this defendant was obligated to pay same and did pay same with the consent of said Lankford to its damage

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in the sum of $2300;" that said commissioner has refused and still continues to refuse to permit the balance of said fund, to-wit, the sum of $2300, to be returned to plaintiff.

The reply was a general denial.

A trial was had, the jury returned a verdict for defendant and plaintiff has appealed.

Plaintiff was in business in Kansas City, and some time prior to the making of the contract between him and Lankford the Oklahoma Bank Commissioner, Murphy, the cashier, borrowed of a bank in Kansas City the sum of $8000 on plaintiff's endorsement. Murphy also put up ninety-one shares of stock owned by him in the defendant bank, as collateral. The borrowed money was placed to the credit of defendant bank and was drawn out by its assistant cashier. Afterwards, plaintiff paid off the $8000 note on which he was security and obtained the stock put up as collateral and some time later became the owner of said stock.

Shortly thereafter Murphy summoned plaintiff to come to Woodward. Arriving there, he found the bank in charge of Deputy Bank Commissioner, McBride. The bank was closed on Saturday and that night plaintiff and his attorney went to Oklahoma City to see the Bank Commissioner, and there a written contract was entered into by which plaintiff was permitted to put up $10,000 so as to guard against the insolvency of the bank and so that the Bank Commissioner would allow the bank to be reopened. At the time the contract was made it was not definitely known just what was the exact condition of the bank, but an audit was to be made to ascertain the exact state of affairs.

Said contract was dated September 25, 1916, and was between Lankford as State Bank Commissioner, first party, and plaintiff as second party. It recited that whereas Murphy was the principal stockholder and the Bank Commissioner "for good and sufficient reasons" had taken charge of the bank and made an order for the removal of said Murphy as cashier, and

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in consideration thereof it was agreed that the stock owned by Murphy should be transferred to some responsible man in Woodward, subject to the mutual approval of the parties, and to be held by such man "until the said Bank Commissioner shall be satisfied of the solvency of said bank and shall give his consent and approval of a permanent transfer of said stock." It was further provided that before the bank should be permitted to resume business, all of the Directors should resign and new directors, acceptable to the Bank Commissioner, should take their place. The contract then provided that

"For the purpose of placing said bank in a solvent condition and for the purpose of repairing the capital stock of said bank the party of the second part shall deposit in said bank within the next two days the sum of $10,000. Said sum or any part thereof to be permitted withdrawn by party of the second part when said bank is wholly solvent and the withdrawal thereof will not in any manner impair the capital of said bank. Said withdrawal to be with the approval of the Bank Commissioner. When the condition of this contract shall have been performed by party of the second part said bank shall be delivered to the duly constituted Board of Directors thereof."

Shortly after, the plaintiff deposited said $10,000 in the defendant bank, the same being placed to plaintiff's account; but it was, of course, made pursuant and subject to said contract. A Mr. Hastings, of Woodward, was agreed upon as the one to hold the stock as specified in the contract and he was installed as the Banking Department's representative and the bank reopened with the Deputy Bank Commission, McBride, present and in supervising control. It is clear that on the reopening of the bank there were several matters to be adjusted and settled, namely, (1) about $6100 of paper that McBride considered uncollectible had to be charged off as assets of the bank, (2) a $4000 Cozarth Grain Company acceptance, which was apprently an accommodation note of Murphy's, had to be taken out of the bank and value sub-

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stituted therefor, (3) a $6120 discrepancy in the account of a correspondent bank had to be made good, and (4) paper of the Murphy family, amounting to $1475 (possibly $1600 with interest)), had to be taken up and cash put in its place.

While the bank was thus open and running under the permission given by virtue of the deposit contract, McBride instructed Murphy not to withdraw any money from his personal account but to leave same there to take care of any paper which the examination might disclose he had wrongfully issued. The Deputy left town for one day, however, and while he was away Murphy issued a cashier's check for $2300 to a fictitious person and for accommodation, and the amount was charged against the funds in his account. The moment McBride discovered this, he ordered that the check should not be paid when presented and told plaintiff that he would stop payment on it.

Thereafter, plaintiff began negotiations with two acquaintances, Lobaugh and Zacharias, to sell them his stock and they finally reached a point where the purchase was likely to be made and the Deputy Bank Commissioner McBride was sent for to sanction the transfer.

It should be here stated that it turned out that the notes, though uncollectible, were good, and the bank did not lose a penny on them; nor did it lose anything by reason of the $6120 discrepancy, as Murphy met it in some way. The evidence is that he took it up with money obtained on the loan he got through plaintiff's endorsement as stated hereinbefore set forth. So that at the time of the proposed sale of plaintiff's stock to Lobaugh and Zacharias, there remained to be adjusted only the $4000 Cozarth acceptance matter and the $1475 worth of Murphy family paper. In addition to this, the cashier's check for $2300, which had come into existence after the making of the contract, the putting up of the deposit and the reopening of the bank under the contract, was outstanding and unpaid, having been, by the Commissioner's

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direction, withdrawn as a charge against Murphy's account, leaving a balance of $2300 therein.

According to defendant's evidence, the purchasers Lobaugh and Zacharias agreed with plaintiff to deposit $1475, or $1600 including interest, in the bank to take up the Murphy family notes; to also deposit $1700, which with the $2300 balance in Murphy's account (remaining there when the cashier's check of $2300 was taken out as a charge thereon), would take care of the $4000 Cozarth matter; and to pay plaintiff $8500 for his stock, he to secure the cancellation of the cashier's check and not allow it to be carried against the bank. According to defendant's evidence, the plaintiff agreed to this and promised to get possession of the cashier's check so that it would never be presented to the bank for payment. The purchasers Lobaugh and Zacharias did make the deposits above mentioned, the Murphy family paper was paid off and the Cozarth matter discharged, plaintiff was paid the $8500 for his stock, and the transfer thereof to Lobaugh and Zacharias was sanctioned by the Deputy Commissioner, and the purchasers took charge of the bank. This was about the 8th of October, 1916.

Plaintiff's evidence denies that he made any agreement to care for the $2300 cashier's check. He also denies that the payment or cancellation of said check was made a condition of the Commissioner's approval of the transfer of his stock. He says that all he was told was when he afterwards asked for the return of his $10,000 deposit he was then informed that the cashier's check for $2300 would have to be cared for by him, and, if not, the amount thereof would be taken out of his deposit.

On December 4, 1916, the plaintiff not having taken care of the $2300 cashier's check, and payment thereof being about to be enforced against the bank, the Commissioner ordered it paid out of plaintiff's deposit which was done. At this time there was and had been a surplus of $3000 in the bank and possibly $2000 of undivided profits, and the bank was, and had

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been, in a solvent condition with its capital unimpaired.

Under the Oklahoma law shown in evidence, a bank is deemed to be insolvent when the actual cash market value of its assets is insufficient to pay its liabilities, when it is unable to meet the demands of its creditors in the usual and customary manner, and when it shall fail to make good its reserve as required by law. [Harris-Day Code, sec. 278 of Oklahoma.] The losses sustained by a bank are charged first to its undivided profits and then to its surplus. [Sec. 280, Harris-Day Code, Oklahoma Stats.] A bank's capital stock is impaired when its losses exceed its undivided profits and its surplus. [Sec. 288, Harris-Day Code.]

There appeared to be ample grounds to justify the Bank Commissioner in taking charge of the bank, and if the $4000 Cozarth claim together with the notes deemed uncollectible and the $6120 discrepacy in the account of the correspondent bank had all been lost, the bank's capital would have been seriously impaired, of not entirely wiped out. But, as stated, it turned out that the notes thought uncollectible were good and the bank did not lose anything thereon, nor did it lose anything by reason of said discrepancy. When the $4000 Cozarth matter was taken up with the $1700 paid in by the purchasers Lobaugh and Zacharias and with the $2300 balance in Murphy's account, and the $1475 Murphy family notes were taken up by the $1475 (or $1600 including interest), paid by said purchasers, the bank's capital was not only not inpaired but there was at least $3000 surplus and some $2000 undivided profits at the time plaintiff sold his stock. There is evidence in defendant's behalf, however, tending to show that the $2000 undivided profits was used in clearing up some of the obligations. But the defendant's evidence shows, and it is therefore beyond question, that the bank's capital was not impaired and that when the Bank Commissioner directed the $2300 cashier's check to be paid out of plaintiff's

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$10,000 deposit the bank had at least a surplus of $3000 and had earned undivided profits in addition thereto from the time the purchasers Lobaugh and Zacharias bought it.

The evidence of the Bank Commissioner (defendant's witness), shows clearly that he refused to allow the full amount of plaintiff's deposit to be returned because he "had been told" that plaintiff "had agreed to make it good," that is, to pay or take care of the cashier's check. He said he had nothing else in mind except the $2300 cashier's check when he refused to permit plaintiff to take down his deposit, and did not put his refusal on the ground that for the bank to pay the said check would impair its capital stock, nor on any other ground except that plaintiff had agreed to pay it.

Having stated the facts thus at length, and with perhaps unnecessary minuteness and detail, we are now ready to discuss the case presented.

From the terms of the written contract plaintiff made with the Bank Commissioner, and under which he deposited his $10,000, it is clear and unquestioned that the purpose of making the deposit was not to make good *any* and *every loss* of the bank, but only "for the purpose of placing said bank *in a solvent condition* and for the purpose of *repairing the capital stock* of said bank." The contract clearly shows that the Bank Commissioner agreed that he would permit said sum or any part thereof to be withdrawn "*when said bank is wholly solvent* and the withdrawal thereof will not *in any manner impair the capital stock* of said bank." Unless the $10,000 was needed to put the bank in a *solvent condition* or to *repair its capital,* it was to be returned to the depositor. The contract nowhere gave the Commissioner any authority to repay any other loss of the bank out of plaintiff's money. The Bank Commissioner is an officer with certain powers limited and defined by statute. Section 302, Harris-Day Code, provides that whenever he shall

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become satisfied of the insolvency of a bank, he may, after due examination into its affairs, take possession of the bank and its assets and proceed to wind up its affairs. Section 306, Harris-Day Code, provides that after he has thus taken possession, the stockholders may repair its credit, restore or substitute its reserve, and otherwise place it in condition to do a general banking business; and if the Commissioner, after a careful examination of its affairs, is of opinion that its stockholders have complied with the laws, that the bank's credit and funds are in all respects repaired, its reserve restored or sufficiently substituted, he may issue his written permission to reopen the bank for business the same as when first incorporated. Plaintiff's contract with the Commissioner was made in the light of these laws, and they also throw light on the answer filed by defendant. For this answer sets forth the conditions under which the Commissioner was about to liquidate the bank and the situation inducing the plaintiff as a stockholder to be willing to put his $10,000 deposit whereby Commissioner permit the bank to reopen.

Now, notice what the answer pleads is the contract set up in defense of the suit to recover the balance of the deposit. It says the deposit was "to be used in reimbursing and securing defendant against *any losses* caused to defendant by the wrongful acts of Murphy as cashier," and "to be applied *pro tanto* in reimbursement for *any* misappropriations or wrongful withdrawal of funds from defendant by said Murphy, and to be returned to plaintiff, subject to *any* deductions for such purposes." The answer then says the Commissioner permitted the bank to reopen and "*thereafter* it was discovered that the said M. D. Murphy had wrongfully issued a negotiable cashier's check of defendant in the sum of $2300" etc; that plaintiff afterwards demanded the return of his money and the Commissioner agreed to immediately return

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him $7700 of it and that he would return him the balance upon plaintiff's securing the surrender and cancellation of the $2300 cashier's check "which plaintiff *then and there agreed to do* for the benefit of of this defendant."

Under one view of this answer it is certainly open to the construction that it pleads a certain contract made by plaintiff with the Bank Commissioner whereby plaintiff agreed to make good *any losses* of the bank on account of bad paper or paper wrongfully issued, that the cashier wrongfully issued a $2300 cashier's check, and that *under the contract* the Commissioner required the $2300 check to be taken care of by plaintiff. For, as far as the allegations of the answer are concerned, under what right or authority *except the contract* did the Commissioner have to demand of the plaintiff that he take up the $2300 check before being entitled to receive the balance of his deposit? And even though the answer does say that when that requirement was made the plaintiff "then and there agreed" to do so, this was nothing more than saying the plaintiff again promised to comply. So that, as stated, the reasonable construction of the answer is that the written contract with the commissioner required plaintiff to pay any and all losses; that the $2300 check was not paid; that under the contract that much of the plaintiff's deposit was used to pay it, and for this reason the plaintiff is not entitled to recover. If this is the proper construction to be placed on the answer, then the proof did not bear it out since the written contract, as above shown, does not provide that plaintiff was to make good all losses without regard to whether they impaired the bank's capital or rendered it insolvent. If the answer is to be so construed, then the defendant's evidence as to the plaintiff's *oral* contract to take care of the $2300 check, should not have been admitted. A defendant cannot plead in defense one contract and offer in evidence a totally different one.

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[Halliwell Cement Co. v. Stewart, 103 Mo. App. 182; Ficklin & Son v. Wabash R. Co., 115 Mo. App. 633; Gruwell v. National Council Knights, etc., of Security, 126 Mo. App. 496, 506; Green v. Cole, 127 Mo. 587.]

But defendant contends that there was no abandonment of its answer; that the answer pleads two different and distinct contracts, one the written contract with the Commissioner and another, an express *subsequent* agreement by plaintiff to secure the surrender and cancellation of the $2300 cashier's check without loss to defendant. But, under the written contract the Bank Commissioner agreed to permit plaintiff's money to be returned to him "when said bank is wholly solvent and the withdrawal thereof will not in any manner impair the capital of said bank." Having thus contracted to return the money under those conditions, how could he impose other and different conditions upon plaintiff before complying with the contract? And even if plaintiff did agree *then* to comply with the new requirement, what consideration was there for such a contract? If, under the written contract, the Commissioner's obligation to return plaintiff's money was already fixed, the promise to perform that obligation could not support the new promise by plaintiff. In such case, the new promise would be without consideration. [Lingenfelter v. Wainwright Brewery Co., 103 Mo. 578; McFarland v. Heim, 127 Mo. 327; Lindsley & Son v. Kansas City Viaduct Co., 152 Mo. App. 221.]

The reasonable and natural construction to be placed on the answer is that under the contract as pleaded the Commissioner required of the plaintiff that he take up the $2300 cashier's check; but if it could be construed as intending to plead a subsequent contract, such contract is not one that imports a consideration, and none is alleged, nor are any facts stated showing that any new consideration existed. It would seem that this should have been done. [Montgomery v. Auchley, 92 Mo. 126; Underwood

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Typewriter Co. v. Century Realty Co., 220 Mo. 522, 529; Slaon v. Mitchell, 149 N. Y. Supp. 1015; McCammon v. Kaiser, 142 N. Y. Supp. 721.] And the fact that nothing of the kind was done tends very much to show that two different contracts were not pleaded and relied upon. The second was not pleaded as a substitute or modification of the first, and cannot be so regarded under the allegations in the answer. [Kalosky v. Bloch, 177 S. W. 1060, 1061.] The so-called new promise to pay the check follows as a mere repetition of the obligation necessarily flowing from the contract that had just been pleaded, and in the absence of any allegation of facts showing a consideration for the new promise, the answer should not be regarded as pleading the new in modification of the old. [Goller v. Hensler Mercantile Oil and Supply Co., 179 Mo. App. 48, 57.]

Under the *pleadings* the plaintiff was a creditor to the full extent of his deposit if the bank was solvent and payment of his deposit would not impair the capital thereof; but, under the *evidence* introduced by defendant over plaintiff's objections, the plaintiff agreed to also pay the cashier's check, notwithstanding the bank was solvent and its capital unimpaired. And, by the *instructions*, the case was submitted in such way that this additional agreement with the Commissioner could be made the sole basis of the verdict. As a matter of fact the evidence appears to be that plaintiff's agreement to pay, if any, was made with *the purchasers of his stock,* not with the Bank Commissioner. But granting that he also agreed *with the Commissioner* to pay said check without referance to solvency or impairment, and to take less than the full amount of his deposit, still such agreement as to the Commissioner was without consideration and not binding upon plaintiff, certainly in a case where the agreement with the Commissioner is relied upon as the defense.

We need not at this time go into the question of whether the Commissioner's approval of the trans-

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fer of plaintiff's stock to Lobaugh and Zacharias would constitute a sufficient new consideration for plaintiff's alleged new promise. There is no evidence that there was any trouble about getting the Commissioner's approval if the purchasers chose to buy. Indeed, if the bank was solvent and unimpaired and the new men were fit to be permitted to assume charge of the bank, and they desired to buy, it was the Commissioner's public duty to grant his approval. As a public official he is in no way concerned with how advantageous a trade a purchaser may be able to make; nor can he use his official power to enable a purchaser of stock to buy at less than he otherwise would. But whether this be true or not, the fact remains that the defense was based upon a contract different from the one stated in the pleading, and the case was, over plaintiff's objections, submitted upon a theory that was outside the issues plaintiff had a right to expect would be litigated when he went to trial. Hence instruction C 1 and D 3 were erroneous. Furthermore, under instruction C 1 the jury could find that simply because plaintiff agreed with the purchasers of the stock to pay the check, he was not entitled to recover his deposit of the bank. There are other features in the instruction which rendered it erroneous. For instance, it is so worded as to require that plaintiff shall have demanded "payment of the balance of $2300." He demanded his $10,000 but there is no evidence that he made any subsequent demand for the $2300 after being paid his $7700. Having demanded the full amount, he did not have to make a separate demand for the balance; and to submit the question whether the balance was demanded was misleading. If it was proper, under any circumstances, to submit the agreement plaintiff is said to have made, the instruction should have set forth the circumstances and conditions under which such alleged agreement would justify the Commissioner

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in refusing to allow plaintiff's money to be returned. To submit the issue of whether the report that plaintiff had agreed to pay the check was false, and whether the Commissioner was misled by such report, was confusing and misleading and did not give the jury any idea of what circumstances were necessary to make such agreement valid.

In the way the case was heard and submitted, the plaintiff did not obtain a fair opportunity to litigate and have decided the issues involved in the case, and it should, therefore, be reversed and remanded for a new trial.

Defendant makes the point that the contract provides that the money was to be withdrawn "with the approval of the Bank Commissioner" and that since his approval was not obtained, plaintiff has failed in his case and hence it makes no difference if there were errors in the instructions.

But this clause in the contract does not mean that the Commissioner may arbitarily or without reason withhold his consent. Nor does it mean that after making a contract specifying the terms under which the money may be withdrawn, he can, without consideration, impose new and additional terms; not even to compel plaintiff to keep an agreement he is alleged to have made with the purchasers of his stock. It may be that for a violation of plaintiff's agreement with them they may have a cause of action against him. We do not say. But, on the issues made in this case, plaintiff is entitled to a new trial.

The judgment is, therefore, reversed and the cause remanded. All concur.

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M. S. DOWDEN, Respondent, v. WALRUS MANUFACTURING COMPANY, Appellant.

Kansas City Court of Appeals, June 10, 1918.

1. **ATTACHMENTS: Sales: Inspection of Books.** The plaintiff sued in attachment to recover a commission alleged to be due plaintiff on the sale of a soda fountain. The plaintiff filed a petition for an order on defendant to produce the duplicate original contract and the books of account showing the amount realized by defendant from the disposition of the fountain. The duplicate original contract was produced but not the books of account. During the trial of the case the plaintiff introduced his contract of sale, and then endeavored to prove what the defendant had received for the fountain, which testimony was objected to and sustained as hearsay. The plaintiff then introduced his order to produce the books of account and asked that he be given judgment by default, for non-production of the books as ordered by the court, which was granted. *Held*, that under the evidence the court erred in giving the plaintiff default judgment because the defendant failed to produce its books of account relating to the transaction on which the suit was based.

2. ———: **Pleading.** A mere allegation in a petition to produce books and accounts for inspection that the evidence is material and necessary won't do, since that is a mere conclusion of the pleader, but the facts should be alleged how and why the production or inspection is necessary so that the court may know and determine for itself the necessity thereof.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner*, Judge.

REVERSED AND REMANDED.

G. A. Swanson for respondent.

Ellis & Yale for appellant.

TRIMBLE, J.—This is an action by attachment, originating in a Justice's court, against defendant (a non-resident corporation), to recover a commission

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alleged to be due plaintiff on the sale by him of a soda fountain under an agency contract plaintiff had with defendant for the sale of its fountains in certain territory. Service was obtained by levying the writ on defendant's property. The defendant entered its appearance, and doubtless, under the statute as it now exists, the attachment was dissolved as nothing further is heard of any attachment feature.

After the case was disposed of by the justice, it was appealed to the circuit court; and while the case was pending there, the parties, by written stipulation, waived a jury.

At the November term, 1915, plaintiff filed a petition for an order on defendant to produce the duplicate original contract between plaintiff and defendant (plaintiff's copy having disappeared after being filed with the justice), and to also produce defendant's books of account showing the exact amount realized by defendant from the disposition of said fountain. This petition was heard and sustained at said term. The duplicate original contract was furnished, but the books of account were not produced. On the contrary, the defendant at said term filed a motion to set aside and vacate said order, but this was overruled.

At the September term, 1916, the court, on plaintiff's motion for judgment by default against defendant because of its failure to comply with the order to produce, and after a hearing thereof, ordered that the motion for judgment by default be passed for the time being as the order to produce had failed to fix the time and place thereof; and thereupon the court ordered the defendant within ten days from that date to "produce at the office of its counsel, Ellis & Yale, 314 Dwight Building, Kansas City, Missouri, for inspection and copy by plaintiff the book or books of the defendant showing, so far as the same do show, the full account in respect to a certain soda fountain claimed herein to have been sold to Trent-Palmer Drug Company, Talequah, Oklahoma, on or about March 13, 1906, and showing the ultimate disposition

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of said soda fountain and the account of the sale and disposition of the same and the amount this defendant ultimately realized therefrom." It was further ordered that if the parties were able to agree as to what defendant's books of account showed in respect to said property, its disposition and proceeds realized therefrom, the books need not be produced, otherwise defendant was ordered to produce them at the time and place aforesaid and notify plaintiff's counsel that the same were open to their inspection.

Thereafter, and at said term, defendant filed a motion to vacate said order, but, upon a due hearing thereof, it was overruled.

At the September term, 1917, a year later, the trial was entered into before the court sitting as a jury. In the progress of the trial, plaintiff introduced his evidence including the contract and his sale thereunder of the soda fountain in question at the price of $1250 and perhaps other evidence in relation to his cause of action. He then sought to prove what the defendant had received for it but as this evidence was hearsay, the defendant objected and was sustained. Not being able to show this, plaintiff introduced the orders to produce heretofore mentioned, and, upon a showing that they had not been complied with as to defendant's books of account, thereupon moved the court "for judgment and its counsel from any further participation or hearing in this case." The court ruled thereon as follows: "The motion for judgment for the amount sued for will be allowed." To this the defendant objected and excepted. Thereupon the court entered a judgment reciting that "Court finds that defendant is indebted to plaintiff in the sum of" $478.54, and adjudging that plaintiff have and recover that sum of defendant and the sureties on its appeal bond, etc. The defendant duly appealed.

The first contention made by appellant is that the suit is, in reality, a proceeding in equity for an accounting, and that, therefore, the justice had no jurisdiction to entertain it and consequently the circuit

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court on appeal acquired none. If the premise is true, undoubtedly the conclusion is correct. We are, however, unable to see wherein this can be regarded as a suit in equity. The contract allowed plaintiff twenty-five per cent of all sales made at defendant's *list price* to be paid by defendant "when payments are received." On all sales *for cash* plaintiff was to receive a further commission of five per cent. If he sold a fountain for *less* than list price the deficiency was charged to him; but if he sold one for more than the list price he was to get a further commission of ninety per cent of the excess "as collections were made." Plaintiff alleged in his statement or petition that on March 13, 1906, he sold to the Trent-Palmer Drug Company of Tahlequah, Oklahoma, a fountain for $1250 the list price of which was $785, and that, as the sale exceeded the list price by $465, plaintiff under his contract, was entitled to receive ninety per cent of said last-named amount, or $418.50; that on or about June 1, said Drug Company went out of business leaving a balance due on said fountain of $645; that defendant took said fountain under its mortgage "in lieu of payment of the balance due on the purchase price of same" and, thereafter, on or about the 15th of July, sold said fountain for $700, but has refused to pay plaintiff his commission, to-wit, $418.50, for which, with interest, judgment was asked.

As the suit originated in a justice's court, no written answer was required and none was filed, but in the absence of any disclosure as to what the defense would be, we must regard the case as containing an answer in the shape of a general denial.

If the original purchaser had paid the remainder due on the fountain, then, upon such payment, plaintiff would have been entitled to his commission; and upon the failure of the purchaser to pay the remainder of the purchase price, if the defendant had sold said fountain in foreclosure of its mortgage and received the money therefrom, plaintiff would be entitled to his commission on, at least, the net amount received

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at such foreclosure sale. Now, if, in *lieu of payment* of said balance, the defendant agreed to take the fountain and did take it under that agreement, thus obviating foreclosure, this was an acceptance of the fountain *at that price* in place of the cash, to-wit, $645, and plaintiff's commission would be legally due. His commission on the excess above the list price was due when such excess was received either through payment by the original purchaser or through foreclosure, and if defendant agreed to accept the fountain in lieu of the $645 debt, then it would seem the agent was entitled to his commission thereon, no matter what the company may have chosen to do with the fountain after that. The fact that it afterward resold it to the successors of the original purchaser for $700 or any other amount would not be a necessary element in plaintiff's cause of action, nor would an allegation to that effect in plaintiff's petition change the suit from law to equity by making it a suit to account for the proceeds of a mortgage. The commission asked is on the amount at which the defendant agreed to take the fountain in lieu of payment of the debt, to-wit, $645, not $700 or any other price defendant may have thereafter obtained for the fountain. When the defendant agreed to take the fountain in lieu of payment, thereby releasing payment or cancelling the debt, this was, so far as plaintiff was concerned, a receipt of the balance due on the fountain and his commission as above stated was *legally* due. The suit is to recover this commission, and, under the circumstances above disclosed, it is not seen how or why the case should be regarded as one in equity. We have not been cited to any authority so holding.

But, even if the case be one at law, the next contention is that the orders on defendant to produce its books are invalid and of no effect; and furthermore that failure to comply with them does not justify the judgment that was rendered. The authority for a court of law to compel a party, at the instance of the opposite party, to produce books and papers is given

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by section 1944 to 1949, both inclusive, Revised Statutes 1909. Before the enactment of these statutes, the power to compel the production of books and papers was exercised by the courts of equity in proceedings under "Bills of Discovery." Since the enactment of said statute, however, bills of discovery are no longer allowed in this State, since the statute "has provided other more convenient modes by which every purpose of such bills can be attained." [Bond v. Worley, 26 Mo. 253, 255.] So that the statutory proceeding in this regard has superseded and has taken the place of the old method of procedure. While this is true, we need not go to the extent of holding that a proceeding under the statute must observe *all* the technical niceties of pleading and other formalities required under an equitable bill of discovery. But it would seem that, even in a proceeding under the statute to compel the production of books and papers by the opposite party, certain essential prerequisites ought to be made to appear in some way to authorize the exercise of such power. It is an important power of great delicacy, and its indiscriminate and unnecessary exercise is exposed to the hazard of being attended with great injustice and mischief. [Cummer v. Circuit Court, 38 Mich. 351.] Among the essential prerequisites of an application for an order to produce books for the inspection of the opposite party are that the books contain evidence that is material to the cause of action in behalf of the applicant. [6 Ency. of Pl. and Pr., 795.] It must be both material and necessary. [14 Cyc. 346.] And it must not only be shown that the production or inspection is material and necessary, but *indispensably* necessary and not a mere precautionary measure to prevent surprise. [6 Ency. of Pl. and Pr., 795.] And the mere allegation that the evidence is material and necessary won't do, since that is a mere conclusion of the pleader, but the facts should be alleged showing how and why the production or inspection is necessary so that the court may know and determine for itself the necessity thereof. [6

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Ency. of Pl. and Pr., 804, 805; 14 Cyc. 346, 374.] The application will not be granted where the facts to be proved by the books can be otherwise established. [14 Cyc. 370.] [See, also, Lester v. People, 150 Ill. 408, 427; State ex inf. v. Continental Tobacco Co., 177 Mo. 1, 43-4; State v. Fitzgerald, 130 Mo. 407, 425.] However, in the case at bar, the orders to produce the books for inspection were made at former terms and the motions to vacate were filed and heard at former terms. At none of these were any bills of exception authorized or made saving and preserving the evidence or the proceedings thereunder or any exceptions to the action of the court either in making said orders or in refusing to vacate them. Nor was any such evidence, or exceptions to the court's action thereon, preserved in the bill of exceptions now before us even if there had been any such "term bill of exceptions" taken by which they were preserved. For this reason such of defendant's objections as go merely to matters which might have been raised at the hearing of the petition for such orders or at the hearing on the motions to vacate, are not open now. Only such matters as will show such orders void on the face of the record can now be considered in determining their validity, and by this we mean the face of the petition for the order as well as the face of the orders themselves.

Considering then the face of the record as to these orders, we take up the question, not so much whether the court had authority to make them or whether it erred in making them, but whether, as applied for and made, they are sufficient to justify the court in rendering the judgment that was entered.

It will be observed first that sections 1944-1947, appear to deal with the *production* of books or papers, presumably in court, to be used and offered in evidence as to such matters as therein are material; while section 1948 provides for the production of same at a specified time and place to allow the other party an opportunity to *inspect and copy.* And the applica-

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tion and orders made are for their production for this latter purpose. In Lester v. People, 150 Ill. 408, herein above cited, the court makes considerable distinction between books that are ordered to be produced *in the presence of the court* for use as *evidence in the trial,* and production at some other place out of the court's presence, even though in possession of some of its officers, for the plaintiff to make *an inspection and copy.* In the case at bar, the object sought is to compel the production of books so that plaintiff may inspect and copy same, presumably with reference to the fact alleged as sought and desired. But leaving out of view any distinction by reason of the desire to inspect instead of to use at the trial, it will be remembered that we have hereinabove held that after having shown the agency contract in question the sale of the fountain and the failure to pay the $645 balance on the purchase price, the plaintiff's right to his commission would be established by proving that defendant accepted the fountain in lieu of the payment of this debt. And this was what was lacking to complete plaintiff's proof.

But the petition for the orders to produce nowhere alleges that the books plaintiff desired to inspect would show such fact nor that such fact was desired. The petition alleges that the book accounts of the defendant "show or should show the account of the *sale and final disposition* of said soda fountain" and "shows or should show the *exact amount realized* by the defendant from the disposition of said fountain;" that "proof of the facts shown by the book or books of the defendant is necessary and material in the trial of this case;" that said books "contain evidence relating to the merits of this action" and are in the possession and control of the defendant, etc. The second order made by the court, whether on its own motion as stated in the record, or on plaintiff's motion for judgment by default, or in fact on the original application, directs the defendant to produce "the book or books of the defendant showing, so far as the

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same do show, the full account in respect to a certain soda fountain," etc., and "showing the *ultimate disposition* of said soda fountain, etc., and the *amount* this defendant *ultimately realized* therefrom."

The only thing appearing in either the petition for the order or in the orders themselves for which their production is desired is the showing of the amount ultimately realized. Nothing is said about a mortgage or that it was desired to show that defendant accepted said fountain in lieu of the debt therein as to everything else except this "ultimate" amount, the petition for the order contains nothing except the very general statement that the "books . . . contain evidence relating to the merits of this action," and the orders themselves refer specifically to nothing except the amount "ultimately realized." So that there is no showing anywhere that the precise thing needed by plaintiff to complete his proof is contained in the books plaintiff desired to inspect, nor that, if the books, had been produced, they would have shown the needed fact. In Cummer v. Circuit Court, supra, it is said that applications for such orders "rest with great reason on very strict ground and they cannot be lawfully granted unless it is shown affirmatively and with great certainty and distinctness that a real necessity exists;" also that it must appear from the application that the production (here it is inspection that is sought), is *indispensably necessary*" . . . and ability to otherwise obtain such evidence must be negatived." But here, even if we overlook the fact that the petition for the order merely states a conclusion that the books contain material and necessary evidence, without a showing of facts as to how and why the evidence is material and necessary, and does not allege that the evidence desired can be obtained in no other way, nevertheless, the *case* discloses that the evidence specifically mentioned in the petition and sought to be obtained by the orders is not the evidence necessary to complete plaintiff's case. This is true even upon the theory that by rea-

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son of the failure to preserve exceptions to said orders and to the refusal to vacate them, the defendant is precluded from complaining of errors in such matters. In Lester v. People, 150 Ill. 408, 416, the court says that mere errors in making interlocutory orders ordinarily furnish no justification for disobeying them, but in orders of this character, if the party against whom they are made desires to contest their validity he may *refuse to obey,* and, in proceedings to enforce the order or to punish for failure to obey, may show in defense that the court had no authority to make the order. No doubt this may be done, but the question is whether or not the objections to the alleged errors in making the orders have been properly preserved. We think that without regard to whether all the irregularities charged against the orders can be raised or inquired into now by defendant, owing to his failure to preserve them in term bills of exceptions, still the facts as disclosed on the face of the petition for the orders and the orders themselves as well as by the evidence in the case, show that neither the orders nor the failure of defendant to comply therewith, entitle plaintiff to a judgment by default on account of such non-compliance.

The record conclusively shows that the judgment was a judgment by default because of the failure to comply with said orders. Section 1947, Revised Statutes 1909 providing the penalty for failure to obey does not expressly, or in so many words, authorize a judgment by default for failure to obey. If the disobedient one is a plaintiff (or perhaps a defendant with a counterclaim), the court "may nonsuit him," or if he is a defendant, the court "may strike out any answer, or debar him from any particular defense in relation to which such books . . . were required to be produced, or may punish him as for a contempt." The action of the court, however, is coercive to compel obedience to its orders and not to reward or compensate the other party. It is true, to strike out the answer in this case would be merely

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to remove the theoretical general denial defendant's appearance had interposed, and this would leave the case in the same shape as if defendant had ignored summons in the first place and had never appeared. The plaintiff would, in such case, be entitled to a judgment by default, but even though that were entered, nevertheless, the plaintiff would be required to prove up his case before getting a final judgment. It may very well be that if the precise fact that a plaintiff desires to establish by the production of books, is the only fact remaining unproved and necessary to complete his case, and he is unable to prove it except by and through compliance with an order to produce, then the court might in the case of wilful and intentional disobedience of such an order, properly made, regard the refusal to produce as an admission or as presumptive evidence that the concealed evidence is against defendant and is as plaintiff claims it to be. In that situation perhaps the court could, under all the facts and circumstances, render judgment for plaintiff. But in the case at bar, there is no evidence that defendant took said soda fountain in lieu of the payment of the debt due thereon, and there is no showing anywhere that the books, if produced, would disclose that fact; nor was there any intimation that such fact was sought to be established by the production of the books. Defendant's letter to plaintiff, which the latter offered in evidence, does not show that the fountain was so taken. At best, it only shows that defendant was contemplating taking possession of the fountain under its mortgage along with other steps then under consideration. But possession of the fountain would have been taken even if the mortgage were foreclosed and the fountain sold in foreclosure. The record is entirely silent as to what was done after the purchaser defaulted in the payment of the remainder due on the fountain. Moreover, the record is such as to carry the inference that the purpose for which the orders were sought was to enable the plaintiff to inspect the books and prepare for trial, and

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that, without first attempting to have the orders enforced, the trial was entered into and when it was discovered that certain evidence was not forthcoming, then, and not till then, was recourse had to the orders, and the nonobservance of same, in the effort to supply the place of such evidence.

Without reference to this last, however, we are of the opinion that, under all the circumstances, the judgment rendered herein was unauthorized and, therefore, it is reversed and the cause is remanded for a new trial. All concur.

STATE ex rel. DICK & BROTHERS QUINCY BREWERY COMPANY, Relator, Appellant, v. QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, June 24, 1918.

1. **MANDAMUS: Railroads: Liquor Shipments.** The relator, a foreign corporation engaged in the manufacture and sale of beer in Illinois, brought mandamus proceedings to compel the respondent railroad to receive, carry, and transport and deliver beer over its line through a certain county in Missouri. A demurrer was filed by respondent and sustained, and relators appealed. *Held*, that the relator was endeavoring to compel the shipment of all liquor and its petition does not disclose definitely whether the sales were consummated in Kansas City or Adair County. If in the latter place they would be violative of the Local Option Law.

2. ———: ———: ———. Under sections 7227, 7228 and 7229, Revised Statutes, 1909, it is unlawful to keep, store or deliver for, or to any person, any intoxicating liquor in Adair county, except in those instances where a person has ordered the liquor for his own or family use and where such liquor is sent direct to the person using same.

Appeal from Adair Circuit Court.—*Hon. J. A. Cooley*, Judge.

AFFIRMED.

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F. U. Kander and *Weatherby & Frank* for appellant.

J. G. Trimble and *Campbell & Ellison* for respondent.

TRIMBLE, J,—Relator, a foreign corporation engaged in the manufacture and sale of beer at Quincy, Illinois, brought mandamus to compel the respondent, the Quincy, Omaha & Kansas City Railroad Company, "to receive, accept, transport, carry and deliver beer offered to it over its said line of railroad" from Kansas City, Missouri, to and through the towns of Kirksville and Novinger in Adair county. The alternative writ was issued and respondent filed a demurrer which the court sustained, and from this order the relator has appealed.

The petition for the writ, after alleging the organization of the relator and the existence of respondent as a common carrier with a line of railroad from Kansas City, Missouri, to Novinger and Kirksville in Adair county, with depots and stations to receive and deliver goods carried, set up that "for a long time it had and still has a large number of customers in Adair county and particularly in the cities of Kirksville and Novinger in said county from whom it received orders for its beer and to whom it supplied the same;" that said beer was shipped over respondent's line of railway and said business was very profitable. The petition further alleged that it was the legal duty of respondent, as a common carrier, to receive, carry, transport, and deliver "*all* beer offered to it" and which is to be delivered at the depots and stations on its line where the same is offered for shipment on orders received by relator and the beer is intended and is for the consignee's own personal and family use.

The petition also discloses that the Prosecuting Attorney of Adair county had warned or notified the

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respondent not to make deliveries of intoxicating liquor to individuals in Adair county and that pursuant thereto the respondent had issued a general order to its agents not to receive liquor consigned to any person at stations in Adair county except alcohol and whiskey to registered druggists and wine to regularly ordained clergymen or priests for sacramental purposes. The petition further alleged that respondent's refusal to accept "all shipments of beer tendered to it by relator" is undue prejudice to it and by such refusal its business has sustained great loss; and that "in failing to accept, receive, carry, transport and deliver beer offered to it by relator" it has and will continue to suffer great business loss and injury; that the refusal to accept, transport and deliver beer offered to respondent and "its refusal to accept in the future all beer which relator may offer respondent for carriage and delivery on its said line of railroad was and is arbitrary, illegal," etc; wherefore, the writ of mandamus was prayed as above stated.

We have set forth the foregoing substance of the petition in order to show that the sole purpose and end sought is to compel the acceptance, transportation and delivery of all beer offered for transportation and not the specific case of beer mentioned therein. While the petition does allege that a case of beer was presented for shipment, in answer to a written order (on one of defendant's blanks) from one Thomas, stating that it was for his own and family use, yet the petition does not seek to compel the acceptance and transportation of that particular shipment but is wholly directed to compelling the acceptance of all beer offered by relator for transportation and delivery over respondent's line. The alternative writ does not direct the respondent to accept and transport the particular case of beer alleged to have been ordered by Thomas but to accept, transport and deliver "all beer offered to you" by

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said respondent. Nor did the alternative writ follow the prayer of the petition, but commanded the respondent "to receive at Kansas City all beer offered" by relator for transportation and delivery to persons in Adair county "where the beer is upon written orders signed by the consignee and received" by the relator "at Kansas City for the own or family use of the consignee, or consignees, and shipped direct to the person or persons ordering the she same."

For the purposes of the consideration of the demurrer it was agreed that the Local Option Law was in effect in Kirkville and in Adair county. That being true, it is unlawful "to keep, store, or deliver for or to another person" any intoxicating liquor in that county except in those instances where a person has ordered the liquor for his own or family use, and where such liquor is sent direct to the person using the same. [Sections 7227, 7228 and 7229, R. S. 1909.] If the liquor were shipped direct from Quincy to Kirksville or Adair county it would come under the ban of the "Reed Amendment" as it would be a shipment of liquor in interstate commerce. We mention this fact, not for the purpose of going into the question of whether relator's shipment of the liquor from Quincy to Kansas City and then from Kansas City back to Adair county is a "palpable evasion" or any evasion whatever of the Federal law, but merely to show within what narrow limits the right to have intoxicating liquor accepted, transported and delivered in local option territory, is confined. The fact that such right is confined to such narrow compass as is prescribed in the above cited statutes, is a circumstance to be borne in mind in considering whether the petition stated a clear and undoubted right to the mandamus sought and whether the court erred in sustaining the demurrer. A peremptory writ of mandamus is not a writ of right, but rests in the exercise of sound judicial discre-

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tion. [State ex rel. v. Bank of Conception, 174 Mo. App. 589; State ex rel. v. Kansas City Gas Company, 254 Mo. 515.] Especially is this true where the subject-matter of the thing sought to be accomplished, or the right to have it done at all, is open to question and is confined to a very narrow compass. Of course, all this applies more properly where the case has been heard on its merits and the court is considering whether it will or will not issue the permanent writ, for it is after hearing the facts that a sound discretion can be exercised. But the circumstance above noted is not without its influence in determining whether the relator's pleading, in such a case, is sufficient to properly present and support the precise right relator is entitled to obtain and have enforced. If it does not, and the trial court has sustained a demurrer thereto, its ruling will be upheld and less leniency will be shown to the defects in the pleadings and less liberality indulged in toward the inferences to be accorded to such pleadings than might be shown and indulged in otherwise. In other words, when, in circumstances like these, relator is entitled, if at all, only to a right within certain very narrow and restricted limits, he must state his pleadings so as to bring the object sought clearly within the limits of his right, and not present his case in such way as to afford him much broader latitude than that to which he is strictly entitled.

Now, the petition for the writ seeks to compel the acceptance and transportation of all beer offered by relator for transportation, while the alternative writ directs the receipt of all beer offered at Kansas City where relator has a written order received at Kansas City signed by the consignee for his own or family use and shipped direct to him. The rule in this State is that "the relief asked in the petition is the only relief that can be granted on a final hearing." [State ex rel. v. Davis, 54 Mo. App. 447, 450.] Neither the petition nor the prayer thereof nor the

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command of the alternative writ are specific. They do not relate to specific shipments but are general and indefinite, the first asking that respondent be required to accept all shipments of beer offered by relator and the second commanding the respondent to accept all shipments where the shipment is made on certain orders and they are intended for the consignee's own or family use. Nothing is stated as to how or in what manner the respondent shall ascertain what shipments come within the qualifying conditions which entitle the shipment to be transported but all of that burden is laid upon the respondent. But the writ of mandamus when finally issued "is an unreasoning, inflexible, peremptory command to do a particular thing therein specified without condition, limitation or terms of any kind." [State ex rel. v. Bank of Conception, 174 Mo. App. 589, 593.] It directs the doing of a clear, legal obligation. There must be no indefinite, non-specific features about the thing to be done, or doubt about whether it should be done. [2 Bailey on Habeas Corpus and Extraordinary Remedies, 800; Bayard v. United States, 127 U. S. 246, 249.] Even if the allegations of the alternative writ could be considered as curative of the defects in the petition for the writ, yet the facts alleged and the limiting conditions stated are not sufficient to disclose definitely whether the sales of the liquor offered for shipment were sales which were consummated in Kansas City or in Adair county, and of course, if they were consummated in the latter place, they would be violative of the Local Option Law.

We think the demurrer was properly sustained and, therefore, affirm the judgment. All concur.

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JOACHIN A. BACHMAN, Respondent, v. H. R. ENNIS REAL ESTATE and INVESTMENT COMPANY, Appellant.

Kansas City Court of Appeals, June 24, 1918.

1. **CONTRACTS: Sale of Real Estate: Stakeholders.** Where one enters into a contract to sell real estate and the purchaser pays earnest money which is deposited with a stakeholder to be forfeited if he fails to comply with said contract, and the buyer does thereafter fail to fulfill the terms of the agreement, the seller may recover said earnest money from the stakeholder, as damages.

2. **DEEDS: Acknowledgments: Release of Dower.** An acknowledgment by a married woman in a warranty deed, made in March, 1880, wherein she joined with her husband, the property intended to be conveyed being owned in fee by the wife, which recited that she executed the same and relinquished her dower in the real estate described in the deed, is valid and sufficient to convey the fee of the wife.

3. **DEEDS OF TRUST: Valid Release: Partners: Abstracts of Title.** A deed of trust may be validly released on the margin of the record by one of two parties to whom the note secured by such deed of trust is payable where such parties were owners of said note as partners.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird,* Judge.

AFFIRMED.

Gage, Ladd & Small for the respondents.

Milton Schwind for the appellant.

BLAND, J.—On the 9th day of August, 1915, plaintiff and one Paris W. Lindsay entered into a contract wherein the former agreed to sell to the latter, for the price and sum of eighteen thousand ($18,000) dollars, real estate located in Kansas City, Missouri.

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The property was to be conveyed subject to a deed of trust securing thirteen thousand ($13,000) dollars, which the buyer agreed to assume as a part of the purchase price, and the balance, five thousand ($5,000) dollars, the buyer agreed to pay in cash. The seller agreed to furnish within ten days from the date of the contract, at the office of this defendant, a complete abstract of title to the property and the buyer was to have ten days thereafter for examination of the abstract and to report in writing to the seller any defect in the title. If the title was defective the seller agreed to have the same rectified within a reasonable time, not to exceed sixty days from the date of the written notice thereof, and if the seller had a good title to the property, or within the time specified for that purpose remedied any defect therein and thereby made such title good, he was to deliver to the purchaser or to his order a good and sufficient warranty deed conveying the property. The contract recited that the purchaser had paid as earnest money five hundred ($500) dollars, to be applied upon the purchase price of the property, which had been deposited with this defendant. The contract further provided that upon delivery of the deed or tender thereof, if the purchaser failed to comply promptly with the terms of the contract by not paying the remainder of the purchase price, the earnest money deposited should be forfeited by the purchaser and upon such forfeiture the contract should in other respects become null and void at the option of the seller.

The seller delivered his abstract of title. The buyer found two objections to the title that are now insisted upon as valid ones. The seller thereafter claimed that he had met these objections and showed a good title and demanded that the buyer consummate the deal. (Plaintiff tendering the deed.) The buyer refused and this suit was brought by the seller against this defendant, who was the stakeholder of said earnest money of five hundred ($500) dollars, for that sum, plaintiff claiming that by his contract the purchaser

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had refused to take the property which he was under obligation to do. The case was tried without the aid of a jury. Judgment was rendered in favor of the plaintiff and defendant has appealed.

The first objection made to the title was based upon the following facts: On March 9, 1880, Eliza J. Stall was the owner of the property and on that day she and her husband conveyed it to Abbie M. Winner by a warranty deed. The acknowledgment taken upon the same day by a notary public recited that Eliza J. Stall and Cyrus G. Stall, her husband, acknowledged the deed as their voluntary act, "and the said Eliza J. Stall, being by me first made acquainted with the contents of said instrument, upon an examination separate and apart from her husband, acknowledged that she executed the same and relinquished her dower in the real estate therein mentioned, fully, without fear, compulsion or undue influence of her said husband."

It is defendant's contention that by reason of that part of the acknowledgment above quoted the deed was not effectual to convey the fee in the land, citing Hendricks v. Musgrove, 183 Mo. 300. In the case cited the land involved was owned by Ludwell Musgrove. He died leaving a widow and six children. The widow (as the statute was at that time) took the fee in the homestead. But she and the children thought she had a life estate only, and that the children had the fee, subject to her life estate. In this belief one of the children (Gilbert Musgrove) bought his sister's (Mrs. Mary F. Hendricks) interest in the land, and she and her husband attempted to convey it to him by warranty deed. Afterwards the widow Musgrove died and thereby the fee, in fact, then descended to the children, though they and their mother thought they already had the fee by descent at the death of their father, subject to the mother's supposed life estate. So, when Mrs. Hendricks (with her husband) made the deed to her brother Gilbert for one-fifth interest, she, at that time, had no interest and did not have until

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her mother afterwards died when she, as one of her mother's heirs, for the first time, became an owner in fee of a one-fifth interest. So the question arose whether this deed to her brother conveyed her after acquired title which she got by descent from her mother. It was held that on account of her defective acknowledgment to the deed it did not. In speaking of this branch of the case the court said: "But whilst the deed was a general warranty deed, it purported to be the deed of John J. Hendricks and his wife Mary F. Hendricks, and it was acknowledged by Mrs. Hendricks only as wife, she relinquishing dower in the land and not by her as owner of the land. The deed was therefore ineffectual to convey the interest of Mrs. Hendricks then existing or thereafter acquired, in the land."

The acknowledgment itself is not set out in the opinion and we have only to look to the language used by the court as a guide to what its terms were. The court says that her acknowledgment was "only as wife" and that it was *confined* to a release of her dower and *did not* embrace an ownership of the land. The conclusion that such an acknowledgment to a deed of the wife's fee was not sufficient is manifestly correct. If we interpret that acknowledgment as desired by defendant in this case, it would be in direct conflict with a line of decisions which long ago became a rule of property in this State. In McDaniel v. Priest, 12 Mo. 545, it was held that the insertion of a clause relinquishing dower in a deed, the intention of which was to convey the fee simple title, rendered the conveyance inoperative. This was in 1849.

But in Chauvin v. Wagner, 18 Mo. 531, 546, McDaniel v. Priest was overruled, and it was held that the language relating to the relinquishment of dower was "merely superfluous and does not vitiate." The deed of a married woman thus acknowledged was held to pass her title to the grantee. This was in 1853.

In 1854 Delasus v. Poston, 19 Mo. 425, 431, followed and approved Chauvin v. Wagner.

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In 1855, in Perkins v. Carter, 20 Mo. 465, the question was before the court again, and it was said that the matter was "settled" in Chauvin v. Wagner, and that it made no difference if there was no recitation in the deed that it was the wife's land.

In 1856, in Chauvin v. Lownes, 23 Mo. 223, Chauvin v. Wagner was again approved and followed.

In 1873, in Miller v. Powell, 53 Mo. 252, the court said: "If the only defect in the certificate of acknowledgment was that it included a clause relinquishing dower, under repeated decisions of this court, the acknowledgment was sufficient to carry the wife's fee in the land." The court further said that the doctrine of Chauvin v. Wagner "must be considered settled as a rule of property in this State."

Again in 1874, in Siemers v. Kleeburg, 56 Mo. 196, 199, the same point being raised, the court said: "The objection to the form of the certificate of acknowledgment of the mortgage is not well taken. The additional words employed therein may be rejected as surplusage." [Citing Chauvin v. Wagner, supra.]

In 1879, in Thornton v. National Exchange Bank, 71 Mo. 221, 231, the doctrine of Chauvin v. Wagner was again approved.

In 1883, in Burnett v. BcCluey, 78 Mo. 676, 688, the foregoing cases were again followed. As already stated the acknowledgment that is objected to in the case at bar was taken March 9, 1880.

The last case where the question appears in Hauser v. Murray, 256 Mo. 58. The court stated (bottom p. 91) that the wife had the fee in part of the land and dower in another part. The acknolwedgment (top p. 91) included a release of dower. Of this acknowledgment the court said: "A careful comparison of this certificate with the statute does not disclose in what particular the former fails to conform to the material requirements of the latter. The deed, therefore, so far as the acknowledgment is concerned, must be held to be valid. This conclusion is, in our opinion, evident from inspection, and the citation of authorities sus-

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taining deeds having like certificates of acknowledgment would tend rather to obscure than illuminate the question. We have examined the cases cited by industrious counsel in opposition to this conclusion, but we do not find them applicable." The case is a recognition that an acknowledgment, including release of dower, is valid for a conveyance of the fee.

In all those cases, as in the one now before us, the acknowledgment may be said to be in a double form; first, an acknowledgment of the deed, and second, a release of dower. In those cases it is said, in effect, that where the wife owned the fee that that part of the acknowledgment relating to dower did not annul or affect the part acknowledging the execution of the deed and that it was merely surplusage.

The foregoing considerations lead to the conclusion that the acknowledgment to the deed involved in the present case, is valid, and that the abstract showed a good conveyance in fee of the property from Eliza J. Stall and Cyrus G. Stall, her husband, to Abbie M. Winner.

The other objection urged against the title is founded upon the fact that there was a deed of trust on the property dated April 16, 1877, which secured a note in the sum of two thousand ($2,000) dollars with ten per cent. (10%) interest, reciting, "This day due to Richard and John Saunders." On the margin of the record where this deed of trust was recorded appeared the following, "This deed of trust is satisfied in full, both principal and interest. Witness our hands and seals this 1st day of February, A. D. 1879. Richard and John Saunders, by John Saunders."

It is defendant's contention that there was no authority shown by John Saunders to release the note on behalf of Richard Saunders. When this objection was made by the buyer the seller within the time specified furnished the buyer with the affidavit of a son of Richard Saunders, who swore that at the times the note was given and released Richard and John

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Saunders were brothers and partners in the hotel and banking business; that they were the owners of said note as partners at the time it was executed and until it was paid, and the property released; that both John and Richard Saunders were dead and that their estates were settled. Of course, under the circumstances, John Saunders had authority to release the note on behalf of the partners. We think that the furnishing of this affidavit removed the defect in the title appearing in the abstract and was sufficient to satisfy defendant that no defect in fact existed, especially in view of the fact that the note had been due for more than thirty-five years at the time of the execution of this contract.

It is said in Ranck v. Wickwire, 255 Mo. l. c. 58, that where a contract required that each party in trading real estate was to furnish the other an abstract showing a clear title and where the abstract submitted showed a defect in the title, the rule to be applied is that "if there is a break or gap in a record title, it becomes the duty of the owner to look up the evidence *in pais* necessary to satisfy the vendee that the title is good. [Gerhart v. Peck, 42 Mo. App. 644, 652.] It became the duty of the plaintiff, therefore, to remove these defects in his title appearing in the abstract or satisfy the defendant that they did not exist." The seller was not required to furnish an abstract showing that he had a perfect title in a strict sense, for roughly speaking there are no such titles. The title to be furnished must have been perfect and safe to a moral certainty; a title which did not disclose a patent defect which suggested the possibility of a lawsuit to defend it; a title, such as a well-informed and prudent man, paying full value for the property, would be willing to take. [Birge v. Bock, 44 Mo. App. l. c. 77; Gerhart v. Peck, supra; Ranck v. Wickwire, supra.] There is no question but that the seller in this case exhibited to the buyer such a title after furnishing the latter the affidavit mentioned.

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We are not unmindful of the fact that the contract provided that the abstract of record should show a good title, and ordinarily, unless the abstract so show, the contract is not complied with. [Austin v. Shipman, 160 Mo. App. 206.] There was no substantial difference between furnishing an abstract with the affidavit embodied therein and in giving the affidavit to the buyer so that it might be attached to the abstract by him. There would be no substantial benefit to anyone in the seller having the affidavit recorded, the recording of such an instrument is not provided for by the recording act and, therefore, if it were recorded, the fact that it was on record would be notice to no one. The recording of the affidavit by the seller would have been an useless proceeding. The contract was substantially complied with when he furnished the affidavit to the buyer. [Ranck v. Wickwire, supra.] However, it will be noted that the contract provided nothing further than that the defect should be remedied. Of course, the things remedying the defect must have been disclosed to the buyer. [Ranck v. Wickwire, supra.] But there was nothing in the contract providing the remedying matter should be placed in the abstract.

Defendant contends that plaintiff is not entitled to recover the five hundred ($500) dollars placed in defendant's hands as earnest money, for the reason that plaintiff did not attempt to offer testimony as to what damage he suffered by reason of the buyer refusing to take the property and that the money placed in defendant's hands must be regarded as a penalty and not as liquidated damages. We are unable to agree with this contention. The damages to be ascertained by the buyer's refusal to take the property was uncertain in amount and the parties conveying having mutually agreed that a certain sum should be the damages in case of failure to perform, in language expressive of such agreement, there is no law to justify the courts in giving the contract a different construction, or in saying that the parties meant some-

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thing else. The parties themselves agreed upon what would be the damages in case the buyer refused to take the property. This was five hundred ($500) dollars. The purchase price of the land was eighteen thousand ($18,000) dollars, of which five thousand ($5000) dollars was cash. Plaintiff also unburdened humself of paying, primarily, a thirteen thousand ($13,000) dollar deed of trust. We cannot say that the damages agreed upon assumed the character of gross extravagance or of wanton and unreasonable disproportion to the nature and extent of the loss. [Morse v. Rathburn, 42 Mo. 594; Wainscott v. Haley, 185 Mo. App. 45; Long v. Lackawanna Coal & Iron Co., 233 Mo. 713.]

The judgment is affiirmed. All concur.

FLOYD J. GRIFFIN, by his next friend, GOLDIE D. SAMPLES, Respondent, v. THE KANSAS CITY RAILWAYS COMPANY, Appellant.

Kansas City Court of Appeals, July 8, 1918.

1. **NEGLIGENCE: Street Railways: Newsboys.** The plaintiff a newsboy, while riding on the steps of the defendant street railway with one hand holding on the upright iron handhold and newspapers underneath the other arm, was struck on the hand by the conductor, breaking his hold on the handhold and causing him to fall from the car so that a rear car or trailer passed over his leg. The plaintiff sues to recover damages received for injuries resulting from the fall. *Held*, that it is within the line of a street railway conductor's duty to eject persons from his car and it was not error for the court at plaintiff's request to instruct the jury assuming such to be the fact.

2. ———: **Instructions: Compensatory Damages.** Where an instruction on the measure of damages told the jury that "they shall take into consideration *in connection with all the facts in evidence* the nature and extent of his injuries," it was not erroneous on account of the use of the words in italics, as such words do not call for punitive damages.

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3. ———: **Pleading and Proof: New Trial.** The petition asked for punitive as well as exemplary damages and the jury returned a general verdict without specifying which kind of damages they gave, whether such circumstances would constitute reversible error is not passed upon as the objection was not raised in the defendant's motion for a new trial, or in its motion in arrest of judgment.

4. **MISCONDUCT OF COUNSEL: Objections.** If the defendant objects to the conduct of plaintiff's counsel in the trial of the case and the court does not rebuke counsel on request, it cannot be reviewed on appeal unless an exception is saved.

Appeal from Jackson Circuit Court.—*Hon. Allen O. Southern,* Judge.

AFFIRMED.

Atwood & Hill for respondent.

Clyde Taylor for appellant.

BLAND, J.—On the 8th day of August, 1914, plaintiff, a ten-year-old newsboy, boarded a car of defendant's predecessor, in Kansas City, Missouri, for the purpose of selling papers to the passengers therein. It had been the practice of defendant's predecessor for two or three years before that date to permit newsboys to sell papers in this manner. plaintiff was upon the rear step with his right hand grasping an upright or vertical iron handhold. His papers were underneath his left arm. He had been there only a moment when the conductor standing in the rear vestibule took two or three steps toward him and then hit him on the hand, breaking his hold upon the iron bar and causing him to fall from the car so that a rear car or trailer passed over his leg. The leg was mangled in such a manner that it had to be amputated. At the time plaintiff boarded the car it was running at the rate of about four miles per hour but it gradually increased its speed and was going about ten miles per hour

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when he was knocked off the car by the conductor. The conductor said nothing before striking plaintiff. Plaintiff testified that "he looked like he was mad. I didn't know he was going to hit me." He further stated in reply to the question "What was he mad at"? A. "Once before he told me to get off and I did. There was another newsboy there and he rolled up a paper and hit him in the back of the head." Plaintiff further testified that he did not know that this conductor was the same one who had put him off the car and that if he had known this he would not have gotten on because he was afraid of him.

In plaintiff's petition he asked for compensatory and punitive damages. He recovered a verdict and judgment in the sum of five thousand dollars and defendant has appealed.

Defendant makes the point that its demurrer to the evidence should have been sustained and that plaintiff's instruction No. 1 was erroneous. Plaintiff's instruction No. 1 did not require the jury to find that the conductor was acting within the scope of his authority at the time he struck plaintiff. Defendant urges that it was not shown that the conductor was acting within the scope of his authority and if there was any evidence to go to the jury on the subject, the question was one for it to settle and not one to be assumed in an instruction. Defendant says that the evidence does not show that the conductor gave any direction to plaintiff to get off the car before striking him and that there is nothing in the record to show why he struck him, whether in discharging a duty for the company or merely for personal spite or ill-will. Defendant urges that there was no evidence of what were the conductor's duties at the time he struct plaintiff, and that because one is employed by another there is no presumption that an act committed by the employee is done within the scope of his employment.

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We believe that the evidence not only shows that the conductor was acting within the scope of his authority but that plaintiff's instruction No. 1 is not erroneous in assuming that fact. While it is true that not every servant of the defendant had a right to eject persons, whether passengers, licensees or trespassers, from the car, it is undoubtedly true that it was within the line of the duty of the conductor to do so. [Drogmund v. Met. St. Ry. Co., 122 Mo. App. l. c. 161, 162; Drolshagen v. Railroad, 186 Mo. l. c. 266.] Plaintiff having shown that the person who struck him was a conductor, the presumption is that the latter had the authority to eject persons from the car. The fact that the conductor struck plaintiff in the manner described in this evidence shows that the former intended thereby to eject plaintiff from the car, as the conductor is presumed to have known the natural consequences of his act in striking plaintiff on his hand, that is, he should have reasonably anticipated that as a result thereof plaintiff would be ejected from the car and that he would be hurt as he actually was. It will be borne in mind that defendant introduced no evidence to show that the conductor was not acting within the scope of his employment in ejecting plaintiff from the car.

We do not understand that defendant is claiming that the conductor struck plaintiff from any motive of personal spite or ill-will, but even if we assume that the conductor struck plaintiff on account of the previous trouble had with plaintiff, defendant would, nevertheless, be liable because the trouble grew out of the master's business, that is, of operating cars and ejecting persons from the cars if they were not desired on them. If there was a previous personal difficulty between the conductor and plaintiff that culminated in this assault, it grew out of matters connected with the master's business and defendant is liable for the act of the conductor in

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striking plaintiff under the circumstances, even though the conductor was angry at plaintiff on account of the previous difficulty as it was shown that he was in the act of ejecting plaintiff at the time of the injury, a duty the conductor was employed to exercise. [Hellriegel v. Dunham et al., 192 Mo. App. 43.]

Defendant insists that the court erred in giving plaintiff's instruction No. 2 on the measure of damages. This instruction told the jury that in estimating plaintiff's damages "they shall take into consideration *in connection with all the facts in evidence,* the nature and extent of his injuries, if any, and whether or not they are permanent; the bodily pain," etc. (italics ours). It is the contention of defendant that the instruction is erroneous on account of it containing the words in italics, for the reason that the instruction was one intended to cover actual and not punitive damages and that by using said words the instruction also permits a recovery for punitive damages, citing in support thereof State ex rel. v. Ellison, 195 S. W. 722. In the case cited the Supreme Court had under consideration the peculiar wording of the death statute of Missouri, section 5427. Revised Statutes 1909. The instruction given in that case apparently covered, in part at least, punitive damages. The language complained of in that instruction clearly permitted the jury to take into consideration the aggravating circumstances shown in the evidence, that is, the circumstances permitting a recovery of punitive damages by calling the jury's attention to the manner in which deceased was killed, the court holding the instruction in that case to have been error, as no aggravating circumstances were pleaded or proved. The instruction in the case at bar is entirely dissimilar to the one cited. The instruction before us is clearly one for compensatory damages only and its form has been approved for that purpose. [Kelly v. Stewart, 93 Mo. App. l. c. 59.] While the petition asks for punitive as well as ex-

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emplary damages and the jury returned a general verdict without specifying which kind of damages they gave, this matter was not raised either in defendant's motion for a new trial or in its motion in arrest of judgment, therefore, it cannot be urged here. [Persinger v. The Wabash St. L. & Pac. Ry. Co., 82 Mo. l. c. 199; Sweet v. Maupin, 65 Mo. l. c. 68.]

Defendant contends that the court erred in refusing to permit it to impeach plaintiff. This was the second trial of the case. At this trial plaintiff was asked if he had talked to the motorman about the manner in which he was injured, and he answered, "I didn't say nothing to him but he kept asking me if it wasn't me that fell off and got run over." Defendant offered to prove that plaintiff swore as follows in the former trial:

"Q. How long had you been there talking to the motorman? A. I don't know.

Q. Well, about how long? A. About two or three minutes.

Q. Two or three minutes? A. Yes, sir.

Q. Now, in that conversation with that motorman, that you have voluntarily told, what did you say to him? Didn't you say to him that you ran from the corner, at the sidewalk, and attempted to get on the car while it was running too fast, and you slipped and fell? A. No. sir.

Q. And in the same conversation didn't you tell him it was your fault? A. No, sir."

We cannot see how the matter offered tended to impeach plaintiff in any particular, for more than one reason. It cannot be said to contradict the evidence quoted above that plaintiff gave at this trial. He stated at this trial, in effect, that he had had a conversation with the motorman but that the motorman did all the talking. This was not a denial that he had talked with the motorman and the matter

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offered to impeach plaintiff did not contradict this testimony. The court did not err in excluding the evidence offered. .

Defendant complains of the conduct of plaintiff's attorney in statements made in his address to the jury. The court sustained defendant's objection to these statements. When defendant requested that plaintiff's attorney be rebuked, which was not done by the court, no objection of any kind was taken to this action of the court or any other in reference to any of these matters. Under the circumstances there is nothing before us for review. [Milliken v. Larabee, 192 S. W. l. c. 106; Hartley v. Werner, 196 S. W. 1072.] This is not one of those extreme cases cited by defendant where an appellate court reverses a case for flagrant and highly reprehensible misconduct of counsel.

Defendant makes the point that the verdict was the result of passion, prejudice and sympathy on the part of the jury. Under this heading defendant discusses the weight of the evidence and the credibility of the witnesses. Of course, these were matters for the jury and ones that we cannot review.

The judgment is affirmed. All concur.

WALTER BRADSHAW, Respondent, v. STANDARD OIL COMPANY, Appellant.

Kansas City Court of Appeals, July 8, 1918.

NEGLIGENCE: Fellow-Servant: Vice-principal. Defendant's general foreman instructed plaintiff, who worked for defendant, to help another employee, a servant in another line of work. The general foreman told the other servant to tell plaintiff what to do and the foreman told plaintiff to do as the other servant directed. While in the act of lighting the gas under refining stills, an act unfamiliar to plaintiff and a work in which the other servant was instructing plaintiff at the time, the other servant turned

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on the gas before a signal was given by plaintiff and an explosion occurred injuring the latter. It was *held*, that under the circumstances related in evidence it was for the jury to say whether or not the other servant was at the time of the accident acting in the capacity of a fellow-servant or a vice-principal and whether such other servant was acting in a dual capacity at the time of the injury.

Appeal from Jackson Circuit Court.—*Hon. William O. Thomas,* Judge.

AFFIRMED.

J. W. Patterson, O. J. Chapman and *C. R. Leslie* for respondent.

John H. Lucas and *William C. Lucas* for appellant.

BLAND, J.—Plaintiff recovered a verdict and judgment on account of damages for personal injuries received by him on the 23rd day of October, 1915, while in the employ of the defendant, and the latter has appealed. The facts show that about three years before the accident plaintiff was in the employ of the defendant and at that time worked for two or three months; that he quit the company and afterwards was employed by the Independence Ice & Cold Storage Company where he worked as an oiler and at different times as a fireman. In the month of October, 1915, he returned to the employ of the defendant and applied for work as a fireman. He went to work for the defendant in a labor gang but was "working up or working in to be a fireman."

Prior to the time plaintiff was injured one Walgenbach and another employee were engaged in firing stills in defendant's refinery located at Sugar Creek, Missouri. Walgenbach's fellow employee for some reason was not working the day of the accident and the general foreman took plaintiff down to the stills and said to Walgenbach. "Here is a man that will help you." "You will tell him what to do." And

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the general foreman turned to plaintiff and said, "Do as he tells you to do." Plaintiff was regularly engaged on the day shift which began at 8:00 A. M. and ended at 4:00 o'clock P. M. of that day. He was directed by the foreman to help Walgenbach who was working on the night shift which began at 4:00 o'clock P. M. and ended at 10:30 P. M.

These stills consisted of large tanks containing oil to be refined. They were about twenty-five or thirty feet in length and six or eight feet in diameter and were arranged in batteries of either five (5) or ten (10) stills each, placed side by side. The oil was heated by means of a coal box at the front and a gas burner at the rear of the still. Two men called pressure still firemen, worked together under a common foreman; one man turned on the gas at the front end of the tanks by means of a "globe valve" while the other at the other end, by means of a torch or lighter consisting of a piece of wire about four feet long with a ball of oiled waste on its end, lighted the gas. The torch was inserted from the opposite end from the "globe valve" into a hole six inches in diameter, called a sleeve, the outside opening of which standing about four feet high and running back through the sleeve to the burner. The burner was lighted by one man putting the lighted torch through the sleeve back toward the burner. After which he stood back and called to the valve man to turn on the valve and upon the valve being turned the burner was lighted.

After the general foreman instructed plaintiff to work under Walgenbach the latter told plaintiff what to do and they went ahead and worked together from four o'clock in the afternoon until about ten o'clock that night, doing such work as cleaning the fire boxes from under five or six stills, tightening up the nuts on the still heads, coaling up the furnaces, etc. About 10:00 P. M. they went down and lighted the coal (as before stated, the stills were heated by coal fires under one end and gas fires under the other), and then

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tightened up more bolts, after this they went to work lighting the gas under the furnaces.

Plaintiff had never had any experience in lighting gas under furnaces but had had experience in lighting coal under stills. Before they started to light the gas under the stills Walgenbach gave plaintiff a torch which they lighted and Walgenbach said, "I will turn on the gas because I know about it more than you do; you go back and stick your lighter in and I will turn the gas on," and plaintiff was to holler "All right" when he put the lighter in. Plaintiff inserted the lighter under the first still and gave the agreed signal and Walgenbach turned on the gas and it was properly lighted. The distance between plaintiff and Walgenbach was twenty-five or thirty feet. They then proceeded to light another still but plaintiff's lighter was not burning bright enough so he shouted to Walgenbach to wait a minute, but Walgenbach, before plaintiff gave the signal "all right," turned on the gas and when plaintiff inserted the lighter there was an explosion, resulting in plaintiff's injury. The general foreman remained on the premises and was about the work from time to time. There was another foreman whose duty it was to inspect the stills and he was back and forth also and passed plaintiff and Walgenbach several times. Neither one of these foremen was present at the time of the accident nor were any further instructions given plaintiff or Walgenbach than those already mentioned.

Defendant contends, first, that Walgenbach was a fellow servant of plaintiff; and, second, that conceding that Walgenbach was a vice-principal of the defendant at the time of plaintiff's injury, his act was that of a fellow servant and not that of a vice-principal and that plaintiff assumed the risk of being injured by the negligent act of one acting as a fellow servant. There is no question but that Walgenbach became defendant's vice-principal when the general foreman told Walgenbach "You tell him" (plaintiff) "what to do," and told plaintiff, "Do as he" (Walgenbach)

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"tells you to do." By these orders and directions Walgenbach was made defendant's vice-principal in the work to be done. [Burkard v. Rope Co., 217 Mo. 466; Dayharsh v. Railway, 103 Mo. 570; Markow v. Gross-O'Reilly Chandelier Co., 190 S. W. 624.]

Although the doctrine of dual capacity has been severely criticized there is no question but that it is the law in this State. One may be acting as a vice-principal and at the same time acting in a dual capacity, that is, also as a fellow servant. And inquiring into the question as to whether he is so acting it must be borne in mind that it is the character of the act and not the rank of the servant which determines the liability or non-liability of the master. [Fogarty v. Transfer Co., 180 Mo. 490; Rigsby v. Oil Well Supply Co., 115 Mo. App. 297; McIntyre v. Tebbetts, 257 Mo. 117; English v. Rand Shoe Co., 145 Mo. App. l. c. 450; Strother v. Milling Co., 261 Mo.] When the doctrine of dual capacity is urged, the question is, was the vice-principal at the time exercising some authority vested in him as such, or was he in the performance of a mere manual act of service incident to the common employment. [Stephens v. Lumber Co., 110 Mo. App. l. c. 405; English v. Rand Shoe Co., supra, l. c. 459; Fogarty v. Transfer Co., supra; Hawk v. Lumber Co., 166 Mo. 121; McIntyre v. Tebbetts, supra; Rigsby v. Oil Well Supply Co., supra, l. c. 314-315; Strother v. Milling Co., supra.]

Plaintiff was directed by the general foreman to work with Walgenbach and to do what Walgenbach told him to do. Walgenbach was also directed to tell plaintiff what to do. When they proceeded to the stills at Walgenbach's direction the latter directed and explained to plaintiff what he was to do. Thereafter they began to light the stills and had been at the work but a moment when the accident occurred. Walgenbach was instructing plaintiff how to do the work and under the circumstances it was for the jury to say whether he was pursuing that course at the time of the accident, although Walgenbach was waiting for

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the signal from plaintiff to turn on the gas and was not saying anything to plaintiff in reference to the work. There was evidence for the jury as to whether Walgenbach was not engaged in teaching plaintiff the work at the time of the accident although he may not have been giving any specific direction at the very moment. Of course, if Walgenbach was at the time teaching plaintiff the work, the former was exercising the authority of a vice-principal. Whether Walgenbach was manifesting at the time the authority of a vice-principal was for the jury under all the facts in evidence. [Strother v. Milling Co., supra; Fogarty v. Transfer Co., supra; McIntyre v. Tebbetts, supra; English v. Rand Shoe Co., supra; Dayharsh v. Ry. Co., supra.]

There was no error in the giving and refusing of instructions and the verdict was reasonable.

The judgment is affirmed. All concur.

J. O. TINSLEY, Respondent, v. ÆTNA INSURANCE COMPANY, HARTFORD, CONNECTICUT, Appellant.

Tinsley v. Aetna Ins. Co.

St. Louis Court of Appeals. Opinion Filed July 12, 1918.

1. **INSURANCE: Fire Insurance: Forfeiture: Waiver.** Where the insurer, in any negotiations or transactions with the insured after knowledge of facts which would otherwise work a forfeiture, requires the insured, in compliance with the provisions of the policy to do some act or acts, incurring trouble or expense, the right to insist upon a forfeiture will be thereby waived.

2. ———: ———: ———: ———: **Nonwaiver Argeement.** The signing by insured of a nonwaiver agreement to prevent a waiver from arising by any action of the insurer in investigating the cause of the fire and ascertaining the amount of the damage, does not protect insurer against waiver, where with knowledge of facts entitling it to a forfeiture, insurer's adjuster required insured to incur trouble and expense in order to comply with the provisions of the policy.

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3. **APPELLATE PRACTICE: Review: Instructions: Harmless Error.** In an action on a fire insurance policy, an instruction that if insurer's inspector knew of additional insurance at the time of the inspection of the property before the issuance of the policy, such knowledge was imputable to insurer, if error was harmless, where the right to a forfeiture of the policy because of additional insurance was waived by insurer's adjuster.

4. **INSURANCE: Fire Insurance: Nature of Policy: Laws Applicable: Fire Insurance on Steamboats.** Under section 6995, Revised Statutes 1909, placing fire insurance on ships, steamboats, and other vessels in the same class with insurance on houses, buildings, merchandise, and furniture, a policy of insurance, delivered in this State to a resident of the State, insuring a steamboat against fire, is a fire insurance policy, and governed by the fire insurance statutes of the State.

5. ———: ———: **Liability of Insurer: Partial Loss: Measure of Damages.** Under section 7022, Revised Statutes 1909, providing that, where there is partial destruction or damage to property, covered by insurance, insured is entitled to recover an amount equal to the damage done to the property, the measure of damages for partial loss by fire is the difference between the reasonable value of the property immediately prior to the fire and the reasonable value thereof, immediately after the fire.

6. ———: ———: **Construction of Policy: Provisions in Violation of Statute.** Provisions in a fire insurance policy, requiring insured to repair the property in case of a partial loss, and undertaking to limit the recovery by a co-insurance feature, with further deductions in certain instances, being directly in conflict with section 7022, Revised Statutes 1909, are wholly ineffectual.

7. ———: ———: ———: **Statutory Provisions.** Pertinent statutory provisions in force when the policy takes effect become as much a part of the contract of insurance as if embodied therein.

8. ———: ———: **Liability of Insurer: Effect of Other Insurance.** Where a fire insurance policy did not contain a *pro-rata* clause, insured may recover the full amount of his loss from the insurer, although there was other insurance on the property.

9. ———: **Actions on Policy: Pleading: Special Defenses Must Be Pleaded.** Insurer, seeking to avoid payment of the full amount of loss because of other insurance, such defense is an affirmative defense which must be specially pleaded if defendant desires to rely thereupon.

10. **APPELLATE PRACTICE: Review: Harmless Error.** In an action on a fire insurance policy, the admission of evidence, tending to prove that the value of the property immediately before the fire was in excess of the value named in the policy, if error, was not prejudicial, since no depreciation prior to the fire was shown, and

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the verdict is fully warranted by the evidence as to the value of the property after the fire as compared to the value stated in the policy.

11. **INSURANCE: Fire Insurance: Liability of Insurer: Measure of Damages: Partial Destruction.** In such action, where the property was partially destroyed, the amount expended by insured for repairs does not constitute the measure of damages.

Appeal from the Circuit Court of Lincoln County.—*Hon. Edgar B. Woolfolk,* Judge.

AFFIRMED.

Chas. H. Stephens, Chas. H. Stephens, Jr., and *R. L. Sutton* of Counsel for appellant.

Stephens, Lincoln & Stephens and *Sutton & Huston* for appellant.

(1) An abandonment or an offer to abandon is an indispensable prerequisite of a claim for a constructive total loss. The first instruction given by the court at the plaintiff's request is erroneous, for charging, in accordance with the policy provision, as to a constructive total loss without reference to the question of abandonment. As there was confessedly no abandonment and no offer to abandon, the whole instruction is misleading and erroneous. 26 Cyc. 697; Globe Ins. Co. v. Sherlock, 25 O. S. 50, at 65; Insurance Company v. Canada Sugar Refining Co., 87 Fed. 491; Stewart v. The Greenup Marine Ins. Co., 2 H. L. Cases 159 Thomas v. The Rockland Ins. Co., 45 Me. 116; Norton v. The Lexington Ins. Co., 16 Ill. 245; Gomila & Co. v. Hibernia Ins. Co., 40 La. Ann. 553; Thompson Steel Co. v. Boylston Ins. Co., 12 Mo. App. 244; 2 Parsons on Marine Ins. (1 Ed.), p. 110. (2) The second instruction given by the court at plaintiff's request is erroneous for ignoring the agreed value of the boat as fixed by the policy. The policy fixed the value at $15,000 and that valuation concluded the parties. The trial court also erred on this point in permitting plaintiff over defendant's objection to introduce opinion

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evidence of a greater value. Lockwood v. The Sangamo Ins. Co., 46 Mo. 71; Insurance Co. v. McLoon, 100 Mass. 475; The Potomac, 105 U. S. 635; Standard Marine Ins. Co. v. Nome, etc., Co., 133 Fed. 646; Sturm v. Atlantic Mutual Ins. Co., 63 N. Y. 77; 4 Cooley's Brief on Insurance, p. 2984; 26 Cyc. 672. (3) The court erred in refusing to consider the well established rule of deducting one-third new for old from the cost of repairs in estimating the amount of damage to the boat and in refusing defendant's instructions Nos. 7, 8 and 9 covering this point. The policy provided for such allowance, which, irrespective of the policy provision, is a well established rule of the law of marine insurance in the adjustment of partial losses. Kerr v. The Quaker City Ins. Co., 33 Mo. 158; Wallace v. Ohio Ins. Co., 4 Ohio, 235; Perry v. Ohio Ins., Co., 5 Ohio, 305; Globe Ins. Co. v. Sherlock, 25 O. S. 68; Joyce on Insurance (1 Ed.), sections 3078 and 3079; 4 Cooley's Briefs on Insurance, p. 2994; Byrnes v. National Ins. Co., 1 Cowden (N. Y.), 265; Eager v. Atlas Ins. Co., 14 Pickering, 141, 147; Richards on Insurance (3 Ed.), section 209; 19 American & English Encyc. of Law, p. 1063, 26 Cyc. 676, and cited. (4) Section 7022, R. S. 1909, has no application to this case. On a proper construction that section does not apply to marine insurance or to personal property. Paragraph 5 of plaintiff's policy provides that in case of partial loss it shall be the duty of the plaintiff to repair the boat, and that the insurance company, after making the deduction of one-third new for old, shall contribute to the cost of repairs in the proportion which the amount of the policy bears to the agreed value of the boat. Section 7022 does not affect such provision. In any event the section does not determine the method of adjusting or fixing the amount of a loss or the proportion for which the defendant would be liable. Sections 6009 and 6010, R. S. 1879; Sections 5897, 5898 and 5899, R. S. 1889; Sections 7969, 7970, 7971, R. S. 1899; Sections 7020, 7021, 7022, R. S. 109. (5) Irrespective of any statutory questions, the third instruction is erroneous in fixing the defendant's

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proportion at one-tenth of the entire loss. As there was $14,500 of total insurance and defendant's policy was for $1000, the defendant at most was liable for 10/145 and not 1/10. Hana v. Insurance Co., 109 Mo. App. 157. (6) Section 7023, R. S. 1909, has no application to a policy of marine insurance, and therefore the policy provision that the defendant should only be liable for such proportion of the loss or damage as the amount to-wit, $1000, bore to the agreed value of the vessel, to-wit, $15,000, or 1/15, was valid and enforcible. Nalley v. Home Ins. Co., 250 Mo. 452, at pp. 471, 472, 474; Laws of 1893, p. 186; 2 Parsons on Marine Insurance (1 Ed.), pp. 405, 406; 26 Cyc. 672; Trull v. The Roxbury Ins. Co., 3 Cushing, 263, at 267. Egan v. British, etc., Ins. Co., 193 Ill. 295; 61 N. E. 1081; Western Assurance Co. v. Southwestern Transportation Co., 68 Fed. 923; Chicago Ins. Co. v. Graham Transportation Co., 108 Fed. 271; P. & O. Steamship Co. v. Atlantic Mut. Ins. Co., 185 Fed. 172; Thompson v. Rockland Ins. Co., 45 Me. 116; Insurance Co. v. Dunham, 11 Wallace, 1. (7) Section 7023, R. S. 1909, violates section 53 of article 4 of the Missouri Constitution, prohibiting special laws and class legislation, and violates the Fourteenth Amendment of the Constitution of the United States, guaranteeing to all persons within the jurisdiction of the State the equal protection of the law, in that said section is inoperative in cities of a hundred thousand inhabitants or more. Woolley v. Mears, 226 Mo. 4850; State ex rel. v. C., B. & Q. Ry. Co., 195 Mo. 245; State v. Miksicek, 225 Mo. 574; State v. Walsh, 136 Mo. 406; State v. Julow, 129 Mo. 163; State ex rel. v. Railroad Co., 246 Mo. 514; Julian v. The Kansas City Star Co., 209 Mo. 102; Houston v. Pulitzer Publishing Co., 249 Mo. 337; State v. Bottling Co., 261 Mo. 306; Bessette v. The People, 193 Ill. 334, 347, 348, 350; Commonwealth v. Hana, 195 Mass. 266, 267; State v. Mayo, 15 N. D. 327; Jackson v. State, 117 S. W. 819, 820, 55 Texas Crim. Reports, 557; Malone v. Williams, 118 Tenn., 390; Janesville v. Carpenter, 77 Wisc. 302, 303; Sutton v. State, 96 Tenn.

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707; People v. Fox, 247 Ill. 407; Ex parte Drexel, 147 Cal. 763; Simon v. Queen Ins. Co., 120 La. 488. The constitutional question here involved was properly raised in the court below. (Abs. p. 273.) Logan v. Field, 192 Mo. 66; Bank v. Bennett, 138 Mo. 500. (8) The policy in suit was void because the assured chartered the vessel without the knowledge or consent of the defendant company contrary to the provision in the policy. There is no evidence of any legal waiver and the court should have instructed the jury on this ground to have returned a verdict for the defendant. Instruction No. 5 (Abs. 255) on the alleged waiver of the forfeiture thereby incurred is erroneous among other reasons for not considering the non-waiver agreement. Tennessee Marine Ins. Co. v. Scott, 14 Mo. 39, star p. 46; Eddy v. Tennessee Marine Ins. Co., 21 Mo. 587; State ex rel. v. James Ellison et al., 269 Mo. 410; Northern Assurance Co. v. Grandview Building Assn., 183 U. S. 308; Lumber Underwriters v. Rief, 237 U. S. 605; Kyte v. Commercial Assurance Co., 144 Mass. 43; Insurance Co. v. Titus, 82 O. S. 161; Oatman v. Bankers Fire Association, 66 Ore. 388; Athens Mutal Ins. Co. v. Evans, 132 Ga. 703; Nickell v. The Phoenix Ins. Co., 144 Mo. 420; Springfield Laundry Co. v. Insurance Co., 151 Mo. 90; Thompson v. Traders Ins. Co., 169 Mo. 12; Keet, Rountree Dry Goods Co. v. Insurance Co., 100 Mo. App. 504; Fletcher v. Minneapolis F. & M. Ins. Co., 80 Minn. 152, 83 N. W. 29; Bakhaus v. Germania Fire Ins. Co., 176 Fed. 879; Gibson Electric Co. v. Insurance Co., 159 N. Y., 418; Matthie v. Globe Ins. Co., 174 N. Y. 489; Richards v. Continental Ins. Co., 83 Mich. 508, 47 N. W. 350; Richards on Insurance (3 Ed.), section 150. (9) The other insurance on the boat existing, at the time the present policy was written, without the knowledge or consent of the defendant company, under the terms of the policy avoided the policy. There was no valid notice given the defendant of such other insurance. The alleged conversation between Tinsley and Wilson at the time Wilson was inspecting the boat for the purpose of fixing its value, was not notice to the com-

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pany. The sixth instruction given by the court to the effect that it was notice is erroneous in law for the reason that it was no part of Wilson's duty to report such conversation or to see how the policies were written, or to do anything except to put a value on the vessel. Hutchinson v. Western Ins. Co., 21 Mo. 97; Hayward v. National Ins. Co., 52 Mo. 181; 2 Mechem on Agency (2 Ed.), sec. 1831; Russell v. Cedar Rapids Ins. Co., 78 Ia. 216, 42 N. W. 654; Butler v. Michigan Mut. Life Ins. Co., 184 N. Y. 337; Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613; Donham v. Hahn, 127 Mo. 439, 447; Columbia Paper Co. v. Fidelity & Casualty Co., 104 Mo. App. 157, 166. (10) The "fine print" speech of plaintiff's counsel, delivered in his closing argument to the jury, and the refusal of the court to sustain the defendant's objections to the conduct of counsel, were so damaging and prejudicial as to amount to reversible error. Barnes v. St. Joseph, 139 Mo. App. 548; Haake v. Milling Co., 168 Mo. App. 180; Torreyson v. Railroad, 144 Mo. App. 637; Sullivan v. Chicago, etc., Ry. Co., 119 Iowa, 1264, 93 N. W. 367; Stauffer v. Railroad, 243 Mo. 324.

Fauntleroy, Cullen & Hay for respondent.

(1) The defendant's breach of warranty on account of other insurance and the chartering of the vessel is waived as a matter of law, and this issue was submitted to the jury under the proper instructions. Maxey v. Met. Str. Ry. Co., 95 Mo. App. 303; Lierheimer v. Ins. Co., 122 Mo. App. 374; 2 Black on Rescission and Cancellation, sec. 547, and other cases cited under Point 1. (2) The Missouri statutes apply to fire policies on steamboats. Sec. 6995, and other Secs. of Missouri Statutes quoted in the Argument; Dierkes v. Ind. Mutual Ins. Co., 159 Mass. 514, 34 N. E. 1133; Logan v. Fidelity & Casualy Co., 146 Mo. 114. (3) Section 7023 is not unconstitutional and, even if it were, appellant is in no position to insist upon such contention. So. Ry. Co. v. King, 217 U. S. 524;

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Ashley v. Ryan, 153 U. S. 436, and other cases cited under Point 3. Nalley v. Home Ins. Co., 250 Mo. 452; Black, Constitutional Law, page 64, sec. 44. (4) The measure of damages under our statute requires the insurer to pay a sum of money equal to the damage done to the property. Rogers v. Ins. Co., 157 Mo. App. 680; Branigan Case, 102 Mo. App. 70; Process Co. v. Ins. Co., 175 Mo. App. 317, and cases quoted from in the Argument under Point 4. (5) The instruction on the measure of damages is correct. Jackson v. British Am. Assurance Co., 166 Mich. 47, 63 N. W. 899, 30 L. R. A. 636, and other authorities quoted in the Argument under Point 5. (6) Defendant, by denying liability, waived notice of abandonment, and such issue was not in the case, even under the doctrine applied to marine insurance. Force v. Providence Washington Ins. Co., 35 Fed. 767; Phillips Ins. sec. 1684 et seq. (7) There is no provision in the policy requiring the insurance to be prorated with other insurance, and plaintiff was entitled to recover the full amount from any insurer, leaving the latter to seek contribution. Newby v. Reed, 1 W. Bl. 416, 14 Eng. Rul. Cas. 498, and note, and cases cited in the Argument under Point 7.

ALLEN, J.—This is an action upon a policy of insurance, in the sum of $1000, issued by the defendant insurance company, on August 3, 1912, insuring the steamboat "Wenona" for one year against loss by fire and other perils; being one of a series of four policies issued simultaneously by defendant to plaintiff (doing business as the Tinsley Steamboat Company) on the boat mentioned, the insurance aggregating in all $10,000. Defendant lived at or near Caruthersville, Missouri, and the policies were delivered to him at that place through a firm of local insurance agents. Shortly prior to the issuance of the policies, the steamboat was "rebuilt" at Paducah, Kentucky, i. e., a new superstructure was placed thereon and

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new engines and boilers installed. On or about November 16, 1912, while the boat was at or near Osceola, Arkansas on the Mississippi River, all of the upper portion thereof was destroyed by fire. Defendant denied liability upon the policies, hence this suit.

The petition is in the usual form. The answer admits "that on or about the third day of August, 1912, at Caruthersville, Missouri, for the consideration of $120.00, said defendant company did then insure The Tinsley Steamboat Co., in the sum of $1000, upon the steamer 'Wenona' for the term of one year, . . . against the peril of fire;" and that defendant received notice of the fire. The other allegations of the petition are denied generally. The answer then sets up certain special defenses. The issues thus raised, so far as now of importance in the case, will sufficiently appear from our discussion, infra, of questions presented by the appeal.

The trial, before the court and a jury, resulted in a verdict and judgment upon the policy in suit in the sum of $950, and the defendant appealed. The appeal was taken to the Supreme Court upon the theory that the constitutionality of section 7023, Revised Statutes 1909, was involved, but that court has transferrred the cause here, holding that the constitutional question was not timely raised and hence not in the case.

Such further reference will be made to the evidence, in the course of the opinion, as may appear to be necessary to a disposition of the questions involved.

As special defenses defendant alleged that the policy was void and unenforcible by reason of violation by plaintiff of the following provisions thereof, viz:

"This policy shall become void if any further insurance, whether valid or not, has been or shall be made on said vessel, which together with this insurance shall exceed the sum of ten thousand and

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00-100 dollars, or upon any assignment of this Policy or charter of said vessel, unless notice is given to this Company, and the same be approved and endorsed hereon in writing by an officer or duly authorized Agent of the Company."

The evidence shows that at the time of the issuance of these policies and thereafter there was additional insurance upon the boat in the sum of $4500; and also that the boat had been chartered to one Nowland a few days prior to the fire. Plaintiff undertook to show that defendant had waived its right to insist upon a forfeiture by reason of either of these matters. There is no evidence that defendant, through an agent or otherwise, knew of the chartering of the vessel until after the fire. There is evidence, however, that shortly prior to the issuance of defendant's policies one Wilson, an inspector for defendant, while making an examination of the boat, at Paducah, Kentucky, for the purpose of valuing the same and reporting to defendant in regard to the desirability of the risk, learned of the existence of the policies of additional insurance, in the sum of $4500; that at plaintiff's request Wilson examined the policies, and advised plaintiff to pay the premium thereon then due.

The evidence further shows that immediately after the fire defendant's adjuster, Captain Scott, was directed by defendant to go to the scene of the wreck and investigate the matter. It appears that he arrived at the wreck on the Sunday following the fire and made an examination of the vessel and an investigation as to the cause of the fire. According to his testimony there was no one upon the boat except a watchman in charge thereof. He testified that he then and there discovered the fact that additional insurance was carried upon the boat and also that the boat had been chartered to Captain Nowland shortly before the fire. There is testimony for plaintiff that Scott directed that plaintiff, or plaintiff's agent, be summoned to meet him at Memphis. It appears that

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plaintiff and Scott first met on a train en route to Memphis; and that on the following day they met in Memphis, in the office of one Hart, an insurance adjuster. One Greenwell, plaintiff's son-in-law, was present. Thereupon, and before proceeding further, defendant's adjuster required plaintiff to sign what is termed a "non-waiver agreement." This instrument provided, in effect, that any action taken by defendant in ascertaining the amount of the loss and in investigating the cause thereof should not waive or invalidate any of the conditions of the policy. The testimony in plaintiff's behalf is to the effect that subsequent to the signing of this instrument defendant's adjuster, Scott, calling attention to certain provisions of the policy, directed plaintiff to have the remains of the boat towed to Memphis, and to have hog chains put thereupon; and that, pursuant to such directions, plaintiff caused these things to be done, at considerable expense.

Scott, in testifying admitted that he called plaintiff's attention to the clause of the policy providing for "proceedings in case of loss." In regard to this he testified as follows: "Mr. Tinsley asked me what he was to do in the matter and I said that acting on the non-waiver agreement and without any authority to tell you anything but as Dana Scott, I will simply say your policies tell you what you have to do and the policy is there, and I showed him the clause in the policy. I showed him the clause that says that he shall use every effort to recover and safeguard that property and have it repaired. I did that as Dana Scott without any connection or authority from the insurance company, just as a friend."

The question as to defendant's waiver of the right to avail itself of these defenses by reason of the said acts of its adjuster, was submitted to the jury by plaintiff's instruction No. 5, which is as follows:

"If you find from the evidence that Dana Scott was the adjuster of the defendant company and was

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authorized by the defendant company to look into or examine and adjust the loss to the Steamer Wenona and that he went to the scene of the fire and met the plaintiff and if you believe that shortly after the fire the said Dana Scott while investigating said loss as such adjuster was informed that the total insurance on said boat was $14,500 and was also informed that said boat had been chartered to a third person and was being run by a third party, at the time it burned, and if you believe from the evidence that after the said Dana Scott obtained information of said matters, he, the said Dana Scott while acting as such adjuster for defendant herein ordered and directed the plaintiff or his agent to meet him at Memphis for the purpose of further investigating said loss and also as such adjuster ordered and directed the plaintiff to have the remains of said boat taken to Memphis and that the plaintiff in obedience to said request and direction met said adjuster at Memphis and had the remains of the boat towed to Memphis, and if you further believe that the plaintiff was put to trouble and expense on account of having to go to Memphis and to have said boat towed there under the direction of said Scott as such adjuster, then you may find that the defendant waived its right to insist that the policy sued upon is void because of excess insurance or because it was chartered to a third party and this is true notwithstanding the defendant had no knowledge before the fire that the boat had been chartered or that the total insurance was $14,500."

It is argued that it was error to thus submit the question of waiver to the jury. But this contention cannot be upheld. It is well settled that if, in any negotiations or transactions with the insured after knowledge of facts which would otherwise work a forfeiture, the insurance company requires the insured, in compliance with the provision of the policy, to do some act or acts, incurring trouble or expense, the

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right to insist upon a forfeiture will be thereby waived. [Bowen v. Ins. Co., 69 Mo. App. 272, and cases cited; Dolan v. Ins. Co., 88 Mo. App. 666; Oehler v. Ins. Co., 159 Mo. App. 707, 139 S. W. 1173; Pace v. Ins. Co., 173 Mo. App. 485, 158 S. W. 892; Keys v. Knights & Ladies of Security. 174 Mo. App. 671 and cases cited, 161 S. W. 345; Shearlock v. Ins. Co., 193 Mo. App. 430, l. c. 437, 182 S. W. 89.]

As to the "non-waiver agreement," it quite clearly appears that in no event could it have the effect of protecting defendant against the consequences of such acts of its adjuster as those here in question. The right of an insurance company to protect itself against a waiver by an instrument of this character appears to have been recognized in Keet-Rountree Company v. Insurance Co., 100 Mo. App. 504, 74 S. W. 469; though such agreements have frequently been held to be wholly ineffectual for such purpose. [See Carson v. Ins. Co., 113 Iowa, 641; Millers Nat'l Ins. Co. v. Milling & Elevator Co., 60 Ill. App. 224; McMillan & Son v. Ins. Co., 78 S. C. 433.]. But however this may be, there is nothing in the terms of the so-called non-waiver agreement to prevent a waiver arising by conduct of the adjuster in requiring the assured to incur trouble and expense in order to comply with provisions of the policy. This instrument undertakes merely to prevent a waiver from arising by any action of the insurance company in investigating the cause of the fire and the amount of the damage. It is by no means clear that such action, alone, would waive a forfeiture in the absence of such an agreement; but it is certain that the instrument does not undertake to protect the company against a waiver by reason of acts of its adjuster such as are here involved, and could have no such effect. [See Rudd v. Fire Ins. Co., 120 Mo. App. 1, l. c. 15, 16, 96 S. W. 237.]

Plaintiff's instruction No. 6 told the jury that if they found that before the policy in suit was issued

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Wilson was employed by defendant for the purpose of inspecting the boat, and did so inspect it and ascertain whether or not it was a desirable risk, and that while making such inspection and investigation he was informed by plaintiff of the insurance of $4500 then on the boat and that the policy was thereafter issued, then the policy sued upon was not void because of the existence of such additional insurance.

Appellant contends that, under the evidence adduced concerning the scope of Wilson's authority as defendant's representative, his knowledge was not defendant's knowledge; and that it was error to give this instruction. Whether or not notice to Wilson of the additional insurance, under the circumstances, was notice thereof to defendant, we deem it unnecessary to pass upon. If it was error to give this instruction (which we do not decide) we think that it was not reversible error. If, after the loss, defendant's adjuster required plaintiff to incur trouble and expense, in compliance with provisions of the policy, such conduct operated as a complete waiver of both of these special defenses.

As the case was sent to the jury by the instructions for both parties, it was necessary for the jury to find the facts hypothesized in plaintiff's instruction No. 5, supra, in order to find a verdict for plaintiff; for otherwise no waiver of forfeiture on account of the chartering of the vessel without defendant's knowledge could have been found. The verdict of the jury must consequently be taken as a finding of such facts in favor of plaintiff, from which a waiver of both of these defenses must inevitably follow.

Whether a waiver of both of such defenses appeared as a matter of law, by reason of the retention of the premiums (which were tendered back only through the answer) or otherwise, as contended by respondent, we need not say. From the facts necessarily found by the jury such waiver inevitably arises. [See Bowen v. Ins. Co., supra.]

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Plaintiff's instructions in regard to ascertaining the total amount of the loss and the amount recoverable under the policies sued upon, are as follows:

No. 2.

"If under the evidence and the instructions you find for the plaintiff and if you find that the fire damaged the steamer Wenona and its apparel and furniture and the value of said steamer and its apparel and furniture was less after the fire than it was before the fire, then in arriving at the full amount of the loss sustained in this case you will ascertain from the evidence the value of said steamer, apparel and furniture immediately before the fire and the value of said steamer, apparel and furniture immediately after the fire and from the value before the fire you will deduct the value after the fire and the result thus obtained will be the total amount of plaintiff's loss and damages on account of the fire."

No. 3.

"If you find for the plaintiff, you will find that the amount of loss and damage which plaintiff should recover in this case, on this policy is one-tenth of the entire loss and damage sustained, ascertained in accordance with instructions No. (2) Two, however, the sum so found, shall not exceed, exclusive of interest, the sum of $1000, and on the said sum so found, you will compute six per cent interest from December 16, 1912, to this date, and add the interest so found to the principal and the sum so found will be the amount of your verdict on the policy, if you find for the plaintiff."

Appellant insists that the trial court erred in giving these instructions. Certain provisions of the policy are invoked in this connection which, it is contended, are controlling. Whether or not these provisions control the amount recoverable depends upon whether or not our statutes relating to fire insurance policies govern the policy in suit. Appellant contends that the policy is one of marine insurance, and is for that reason unaffected by our laws relating to fire insurance. But we think that this contention is un-

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sound. The policy was delivered in this State to plaintiff, a citizen of the State. It is a Missouri contract, and insures against loss by fire; and the action is one for a fire loss. That it is governed by the Missouri laws relating to fire insurance policies we think cannot well be doubted. We perceive nothing in our statutes to warrant the conclusion that a policy insuring a steamboat or other vessel against loss by fire is to be exempt from the operation of our laws governing fire insurance policies generally. And as opposed to such view section 6995, Revised Statute 1909, places fire insurance on "ships, steamboats and other vessels" in the same class with insurance on "houses, buildings, merchandise, furniture," etc.

Holding, as we do, that the contract of insurance here drawn in question is governed by our fire insurance statutes, it follows that the amount recoverable as for a partial loss is to be determined by the provisions of section 7022, Revised Statute 1909. That section provides:

"Whenever there is a partial destruction or damage to property covered by insurance, it shall be the duty of the party writing the policies to pay the assured a sum of money equal to the damage done to the property, or repair the same to the extent of such damage, not exceeding the amount written in the policy, so that said property shall be in as good condition as before the fire, at the option of the insured."

Under this section the insured is entitled to recover, for a partial loss, "a sum of money equal to the damage done to the property." The damage done to the property is properly ascertainable by proof of the reasonable value of the property immediately prior to the fire and the reasonable value thereof immediately after the fire. [See McIntyre v. Ins. Co., 131 Mo. App. 88, l. c. 94, 110 S. W. 604; Sharp v. Ins. Co., 164 Mo. App. 475, 147 S. W. 154.] The provisions of the policy requiring the insured to repair the property, in case of a partial loss, and undertaking to limit the recovery by a coinsurance

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feature, with further deductions in certain instances, are wholly ineffectual, being directly in conflict with the provisions of section 7022, supra. In like manner other provisions of the policy which conflict with our statutes are without effect. The pertinent provisions of our statutes, in force when the policy took effect, became part and parcel of the contract of insurance as if embodied therein. [Havens v. Ins. Co., 123 Mo. 403, 27 S. W. 718; Sharp v. Ins. Co., supra.] The statutory provisions control over inconsistent provisions of the policy, rendering the latter nugatory. [See Havens v. Fire Ins. Co., supra; Sharp v. Ins. Co., supra; Branigan v. Ins. Co., 102 Mo. App. 70, 76 S. W. 643; Ampleman v. Ins. Co., 35 Mo. App. 314.]

It follows that it was not error to give plaintiff's instruction No. 2, despite the provisions of the policy upon which appellant relies. It is unnecessary to refer to all of these provisions at length, since to the extent they conflict with our statutes controlling the matter in hand they are without influence.

Nor do we perceive any error in giving plaintiff's instruction No. 3. It is urged that this instruction is erroneous in allowing a recovery in this action for one-tenth of the entire loss and damage, since it appeared there was other insurance upon the boat, which, appellant says, "would naturally have to pro-rate with the $10,000 of insurance, of which the policy in suit was a part." But the policy sued upon contains no "*pro rata* clause." And in the absence of a provision in the policy to the contrary it is held the insured may recover the full amount of his loss from any insurer, leaving the latter to seek contribution. [See 4 Cooley, Briefs on Insurance, p. 3098.] Furthermore, the answer does not set up such defense, *pro tanto*. It is an affirmative defense which must be specially pleaded if defendant desires to rely thereupon. [See Fager v. Commercial Ins. Co., 189 Mo. App. 464, 176 S. W. 1064, and cases cited.]

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We think that appellant cannot justly complain of the amount of the verdict, to-wit, $950, upon this policy; thus fixing plaintiff's total loss at $9500. One witness for plaintiff testified that the value of the property immediately after the fire was $3500. Another placed such value at from $4000 to $5000, adding, this was a "large estimate." In the policy the value of the property is agreed upon as being $15,000; and appellant contends that this must be taken as its value prior to the fire. Evidence adduced by plaintiff, admitted over defendant's objections, tends to show that the value prior to the fire was in excess of $15,000. Assuming, without deciding, that appellant is correct in its said contention, then, since no depreciation was shown prior to the fire, which occurred a little more than three months after the policy was issued, the verdict, as one-tenth of the loss, ascertained in accordance with plaintiff's instruction No. 2, supra, is fully warranted. And in this view the admission of plaintiff's testimony regarding the value of the property prior to the fire, could not, in any event, be regarded as prejudicial error.

It is true that the evidence shows that the vessel was repaired and equipped after the fire at a cost of $6000 to $7000. But the amount thus expended for repairs does not constitute the measure of plaintiff's damages. Plaintiff was not bound to repair the property; and the evidence shows that no attempt was made to restore the boat to its original condition. The evidence is that the vessel was "rebuilt" out of rough material, for use as a towboat; whereas it had previously been a passenger and freight boat. As reconstructed there was no room upon it to carry either passengers or freight; and much of the original equipment was not replaced.

A point is made regarding alleged improper remarks of counsel for plaintiff in argument to the jury, but we regard it as entirely clear that the re-

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marks in question were not of a prejudical character, warranting a reversal.

We perceive no reversible error in the record, and it follows that the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

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By J. L. FORT

(Cases are inserted in the order received by the publisher.)

ABSTRACT OF TITLE. See **Deeds of Trust.**

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ADMINISTRATION. See **Judgments.**

1. **Administrator: Partnership Estates: Liability of Bondsmen.** A and B were partners. A died and B qualified as administrator of the partnership estate. Before this estate was settled B died and C was appointed administrator *de bonis non* of the partnership estate and D was appointed administrator of B's individual estate. D sued the sureties on B's bond for the appraised value of the partnership estate and recovered judgment for the full amount. *Held* that the two estates (individual and partnership) having been placed in different hands the administrator of B's individual estate had no right to maintain such suit. State ex rel. v. Hubbard, 137.

2. And while probate courts, in administering justice in proceedings over which they have jurisdiction, may apply equitable and common-law principles in reaching their conclusions, they have no common-law or chancery jurisdiction. Peck v. Fillingham, 277.

3. **Executors and Administrators: Subrogation: Claim against Estate: Jurisdiction of Probate Court: Statute.** While section 198, Revised Statutes 1909, provides that the probate court shall have jurisdiction to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate, yet the probate court has no jurisdiction over a claim against a testatrix's estate arising from the fact that mortgagees foreclosed deeds of trust given by testatrix on realty specifically devised to claimants thus forcing claimants to pay the incumbrances, they claiming to be subrogated to the rights of the holders of the incumbrances and to have the claim allowed against the estate; for subrogation is a subject cognizable alone in courts which have equitable jurisdiction. Ib.

4. **Insane Persons: Allowance in Probate Court: Action in Circuit Court: Personal Judgment.** A person was declared insane in the probate court and placed under guardianship. He was afterwards restored to his right mind and the guardian discharged. While the guardianship was pending an account, accruing against him before his insanity, was allowed to a creditor against his estate by

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ADMINISTRATION—Continued.

the probate court, but it was not paid. The creditor then brought suit on the judgment in the circuit court against the former insane person praying a personal judgment against him. It was *held* that the action could not be maintained. Johnson v. Kaster, 501.

5. **General Claim.** There is no statute in Missouri that provides for "a general claim," no such term being used in the classification of demands against an estate. Real Estate & Building Co. v. Robinson, 515.

6. **Executors and Administrators: Claims Against Estates: Priority: Collections by Agent: Trust Fund: Equity.** In a suit in equity, by which it is attempted to charge the assets of the estate of a real estate agent, deceased, in the hands of his administrator, with a special lien against those assets, on the claim that moneys collected by such agent in his lifetime, as rentals of the property of plaintiff, went to swell and increase his assets during his lifetime, and had passed into the possession and control of his administrator, where it affirmatively appears that none of this money passed to the administrator, and that all of the money that he had was derived from the sale of real estate and personal property, and even that was realized from the sale of the equities of deceased in these properties; *held* that there is an entire lack of any evidence that the money, rentals of plaintiff collected by deceased, went to the benefit of or swelled the estate to the amount of the trust property or its proceeds, much less that any of it ever came into the hands of the administrator. Ib.

AGENT. See **Evidence: Physicians and Surgeons.**

AGREED STATEMENT OF FACTS.

Where an attorney, without any reservation, participated in settling an agreed statement of facts, and made no special appearance in the agreed statement, thereby elected to plead to the merits, and will not be heard, afterwards, to say that he was not properly called into court. Warren v. Railway Conductors of America, 200.

AIDER BY JUDGMENT. See **Practice.**

ALIMONY. See **Husband and Wife.**

APPEAL AND ERROR.

1. **Record: Matters Presented for Review.** In a suit to collect a poll tax, a contention based on the fact that the village marshal was also street commissioner and collector would not be considered, where there was no mention of such question in the record proper or bill of exceptions. Village of Nixa v. Wilson, 33.

2. **Scope of Review.** In action on fire policy, where there was substantial evidence of total loss, the finding of fact that there was a total loss by the judge cannot be overturned. Horine v. Royal Ins. Co., 107.

3. **Review: Findings of Fact.** A finding of fact by the trial court in an action at law is, where supported by evidence, conclusive on appeal, in the absence of a showing of passion, prejudice or willful misconduct. Stewart v. Asbury, 123.

4. **New Trial: Reasons: Review.** Where the trial court, on motion for new trial, set aside the verdict without giving any reason therefor,

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APPEAL AND ERROR—Continued.

the appellate court will affirm the judgment if any one of the various grounds stated in the motion are sufficient. Frisbie v. Scott and Schwald, 131.

5. **Review: Order Granting New Trial.** The record not showing the theory on which new trial was granted, the order should be sustained on appeal, if it can be, on consideration of the whole record. Lowery v. Smith, 163.

6. **Harmless Error: Instructions.** The word "listen," in an instruction that it is the duty of one about to cross a street, where vehicles may be expected, to look and listen, and if plaintiff stepped on the street without looking, and had he looked he could have seen defendant's auto in time to avoid being struck, he cannot recover, while superfluous, is harmless; the instruction clearly showing it is predicated on the duty to look. Ib.

7. **Review: Harmless Error.** In an action against a railroad company for injuries to a shipment of live stock. The erroneous reception of evidence of admissions of the railroad company's agent not made in the course of his employment cannot be treated as harmless because cumulative or other evidence of the company's negligence. Robinson v. Bush, 184.

8. **Appellate Practice: Error in Instruction: Not Reversible Error.** In action against a school of osteopathy and a member of its faculty, in which plaintiff alleged in her petition that defendant member broke and crushed her sternum, instructing that plaintiff claimed in her petition that defendant member "crushed, depressed, or fractured said gladiolus," etc., is not reversible error, in view of Revised Statutes 1909, section 2082; there being testimony that the gladiolus was part of the sternum, etc. Atkinson v. Am. School of Osteopathy, 251.

9. **Appellate Practice: Review: Demurrer to Evidence.** Where at the close of plaintiff's case upon the overruling of the defendant's demurrer to the evidence, it introduced no evidence, plaintiff's evidence to sustain his case must be accepted upon review as true, together with all reasonable inferences and deductions which may be drawn therefrom. Most v. Goebel Const. Co., 336.

10. **Appellate Practice: Harmless Error.** An assignment of error that an instruction given for plaintiff proceeded upon the theory that a chain supporting the scaffold or structure was fastened to the roof, when the petition averred it was negligently attached to a timber on the roof, is purely technical, and without real merit. Ib.

11. **New Trial: Harmless Error.** If plaintiff under his petition and the evidence adduced, was not entitled to go to the jury, then the order of the trial court setting aside the verdict for defendants, upon the theory that error had been committed in the course of the trial, cannot be permitted to stand, since no such error, if any, can be said to have been prejudicial to the rights of plaintiff, and serve as a valid reason for setting aside the verdict, if in fact the court should have sustained a demurrer to the evidence. Thompson v. Paving Co., 356.

12. **Appellate Practice: Sufficiency of Information: Bill of Exceptions.** To enable the appellate court to consider the sufficiency of an information, it is not necessary that there be a bill of exceptions. State v. Goldman, 416.

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APPEAL AND ERROR—Continued.

13. **Absence of Bill of Exceptions: Presumptions.** On appeal in a criminal case in the absence of bill of exceptions bringing up the evidence, the appellate court is confined to the single question of whether the information will support the judgment of conviction, for it must assume that the evidence and course of trial justified the finding and judgment, if the information charged the commission of an offense. State v. Goldman, 416.

14. **Appellate Practice: Trial Practice: Theory of Case in Trial Court.** The appellate court will not remand the cause with directions to enter the claim against the estate, when no such point was made in the trial court, and such an order is resisted by the administrator. Real Estate & Building Co. v. Robinson, 515.

15. **Appellate Practice: Verdict of Jury: Conclusive on Appeal.** The findings of a jury as to the cause of death of insured based on conflicting evidence is conclusive on the appellate court. Holmes v. Protected Home Circle, 528.

16. **Appellate Practice: Review: Harmless Error.** In an action on a fire insurance policy, the admission of evidence, tending to prove that the value of the property immediately before the fire was in excess of the value named in the policy, was not prejudicial error, where no depreciation was shown prior to the fire. Tinsley v. Aetna Ins. Co., 693.

17. **Appellate Practice: Review: Instructions: Harmless Error.** In an action on a fire insurance policy, an instruction that if insurer's inspector knew of additional insurance at the time of the inspection of the property before the issuance of the policy, such knowledge was imputable to insurer, if error was harmless, where the right to a forfeiture of the policy because of additional insurance was waived by insurer's adjuster. Ib.

APPELLATE PRACTICE. See **Appeal and Error: Judgment.**

APPLIANCES. See **Master and Servant.**

APPURTENANCES. See **Landlord and Tenant.**

ARCHITECTS. See **Evidence.**

ASSUMED RISK. See **Master and Servant: Negligence.**

ATTORNEY'S CONTRACT. See **Instructions: New Trial: Practice.**

ATTORNEY'S FEES. See **Garnishment: Husband and Wife: Interpleader: Partition.**

ATTORNEY'S LIEN.

An attorney has a lien, as between himself and his client, upon the cause of action and judgment for his fee. Warren v. Railway Conductors of America, 200.

ATTACHMENTS. See **Practice.**

1. **Intent to Leave the State.** Since the husband can change his domicile without obtaining the wife's consent, and the wife's residence follows and coincides with that of her husband, his intention to change the domicile determines her intention to change in the absence of any showing that the wife refused to recognize or abide by the husband's intention. Hence, in such case, in order to sus-

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ATTACHMENTS—Continued.

tain an attachment on the ground of an intent to leave the State, the attaching creditor need only show the husband's intention in that regard without showing similar intention on the part of the wife. Ware v. Flory, 60.

2. **Sales: Inspection of Books.** The plaintiff sued in attachment to recover a commission alleged to be due plaintiff on the sale of a soda fountain. The plaintiff filed a petition for an order on defendant to produce the duplicate original contract and the books of account showing the amount realized by defendant from the disposition of the fountain. The duplicate original contract was produced but not the books of account. During the trial of the case the plaintiff introduced his contract of sale, and then endeavored to prove what the defendant had received for the fountain, which testimony was objected to and sustained as hearsay. The plaintiff then introduced his order to produce the books of account and asked that he be given judgment by default, for non-production of the books as ordered by the court, which was granted. *Held*, that under the evidence the court erred in giving the plaintiff default judgment because the defendant failed to produce its books of account relating to the transaction on which the suit was based. Dowden v. Walrus Mfg. Co., 657.

AUTOMOBILES. See **Insurance: Replevin.**

Husband and Wife: Master and Servant: Entertainment of Visitors. A husband kept an automobile for the use of himself and family. His wife took out the car for the purpose of taking her mother and sister, who were visiting her and her husband, on a pleasure drive. On the drive she negligently collided with a wagon and team, injuring a woman in the wagon. The husband knew she took the machine whenever she wanted it, but did not know that she was out with it on this occasion. It was *held* that the trial court should have declared, as a matter of law, that she was not the husband's servant and that he was not liable. Mast v. Hirsh, 1.

BANKRUPTCY. See **Liens.**

Trustee: Authority of. The trustee in bankruptcy is, under Bankruptcy Act July 1, 1898, chapter 541, sec. 67e, 30 Stat. 564 (U. S. Comp. St. 1916, sec. 9651), authorized to enforce the rights of creditors of the bankrupt to set aside liens which are void under the State law for want of recording. Stewart v. Asbury, 123.

BILL OF EXCEPTIONS. See **Appeal and Error.**

BANKS AND BANKING.

1. Where there is a "kiting" operation being conducted by a depositor in each of two banks, there is no presumption in the absence of evidence that one bank knows the condition of a depositor's account in the other bank but such evidence may be established by inference. So where for seven months a "kiting" operation has been in existence and over $600,000 in checks have passed between two country banks and where the defendant bank claimed to be innocent of knowledge of the "kite" but knew that its depositor had no property and was judgment proof and it received blank checks signed by the depositor of the other bank to take care of any checks coming in signed by its depositor and its depositor had no funds with it except the worthless checks of the depositor in the other bank, there was evidence for the jury on the question

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BANKS AND BANKING—Continued.

of defendant bank's knowledge of the fraudulent "kiting" of checks. Savings Bank v. Am. Trust Co., 491.

2. **"Kiting Checks:" Acceptance.** The stamping of checks by a bank, upon which the checks were drawn, as "paid" does not have the effect of an acceptance of an inland bill of exchange, which is irrevocable, where the bank's conduct is induced by fraud. A bank which assumes to pay a check drawn upon it, which it has not certified, may countermand its action, where its conduct is induced by fraud and where the rights of third parties have not intervened. Ib.

3. **Certified Checks: Interpleader.** Under the circumstances of this case, a bank holding a certified check on which payment is stopped has the right to have contending claimants to the fund affected by the check, litigate and judicially determine who is rightfully entitled thereto. Bathgate v. Exchange Bank of Chula, 583.

4. A bank certifying a check at the request of the drawer, does not agree that it would pay the check at all events, but only that the amount thereof would be forthcoming if delivered and when presented by one lawfully entitled thereto. Ib.

5. **Deposits: Capital Impaired.** Under the Oklahoma law, a bank is deemed to be insolvent when the actual cash market value of its assets is insufficient to pay its liabilities, when it is unable to meet the demands of its creditors in the usual and customary manner, and when it shall fail to make good its reserve as required by law. The losses sustained by a bank are charged first to its undivided profits and then to its surplus. A bank's capital stock is impaired when its losses exceed its undivided profits and its surplus. Lebrecht v. New State Bank of Oklahoma, 642.

BULK SALES LAW. See **Fraudulent Conveyances.**

Construction as a Whole. The Bulk Sales Law should be read as a whole for the purposes of construction. Balter and Miller v. Crum et al., 380.

CARRIERS.

1. **Interstate Shipment: Action for Freight: Estoppel.** Estoppel is not available as defense to action for balance of freight for interstate shipment where, through mistake in computation, the full lawful rate, which could not be varied, was not collected, though the consignor, who also was consignee, will suffer loss through insolvency, arising since the original payment, of the person to whom the goods while in transit were sold, with indorsement and delivery of the bill of lading. Bush v. Driller Co., 152.

2. **Carriage of Live Stock: Actions: Evidence.** Where a shipper of live stock alleged that the railroad company was guilty of negligent delay in transportation, the shipper, while having the burden of proving such negligent delay, need not establish it by direct evidence. Robinson v. Bush, 184.

3. **Liability.** A carrier is not liable for injuries to animals being transported where such injuries result from the propensities of the animals themselves, or from attacks of the other animals. Ib.

4. **Carriage of Live Stock: Action: Negligence: Averment.** In an action for damages to an interstate shipment of live stock in which

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CARRIERS—Continued.

the carrier's liability was governed by the Carmack Amendment (Act June 29, 1906, ch. 3591, section 7, pars. 11, 12, 34 Stat. 595) as altered by the Cummins Amendment of 1916 (Act Aug. 9, 1916, ch. 301, 39 Stat. 441 (U. S. Comp. St. 1916, sec. 8604a), where plaintiff alleged the negligence of the railroad company instead of relying on its common-law liability as an insurer, he must, having averred the negligence, prove it as alleged, or there can be no recovery. Ib.

5. **Liability: Liability as Insurer.** A common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, of the act of fault of the owner or shipper, although as to those excepted cases the carrier may be liable by reason of negligence. Ib.

6. A notice sent by the shipper to the carrier concerning damaged freight is not sufficient, to comply with the provisions of the shipping contract, which specifies that a claim therefor must be filed with the shipper within four months, where no reference is made to damages or loss, much less any claim therefor, and gave no intimation that claim would be filed therefor. Cudahy Packing Co. v. Bixby et al., 589.

7. **Common: Damages: Meats: Shipments.** Where a shipment of meat is damaged and a notice is sent by the shipper to the carrier and the notice specifies the shipment so that the carrier may readily identify it, and such notice also apprises carrier of the character of the claim and discloses that an investigation is necessary and affords opportunity for that to be done, the shipper will be *held* to have complied with the shipping contract, which specifies that the claim must be filed with the carrier at the point of delivery, or at the point of origin, within four months after delivery. Ib.

CHATTEL MORTGAGES. See **Landlord and Tenant.**

1. Relator lent his money on a note apparently secured by chattel mortgage on cattle, but which was worthless since there were no such cattle in existence nor did any individual of the mortgagor's name or description exist or own any such cattle. Relator took the note and chattel mortgage without investigation, relying upon the fact that similar notes had been paid. The notary negligently certified to the identity of the mortgagor, but the relator's loss arose from the fact that no cattle were in existence from which security could have been had if the notary's certificate had been true. The act of the notary did not have the effect of substituting another in the place of the one who had obtained the former loans since the evidence shows that the same man made relator's note. Consequently, the notary's certificate did not proximately cause the loss, and, therefore, relator could not recover more than nominal damages, but, because the notary's act was a violation of official duty which relator was entitled to have performed, relator is entitled to nominal damages. State ex rel. v. Packard, 53.

2. **Foreign Corporations: License to do Business: Contracts.** A contract entered into in this State by a foreign corporation not authorized to transact business in this State is not void where the company complies with the statutes of this State before any attempt is made to perform said contract (following Wulfing v. Armstrong Cork Co., 250 Mo. 723). Frazier v. City of Rockport, 80.

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CHATTEL MORTGAGES—Continued.

3. **Power of Sale: Notices.** Powers of sale in chattel mortgages must be strictly followed as to places and time of posting notices, and in all other particulars. Huber Mfg. Co. v. Ellis, 96.

4. **Stipulations Drawn by Mortgagee.** A stipulation drawn by a mortgagee regarding change of place of sale to another county will not be added to by intendment so as to allow posting of notices in such other county contrary to the mortgage provisions. Ib.

5. **Foreclosure: Place of Sale: Notices.** Where mortgagee obtained a stipulation that a sale be held in another county, but nothing was said as to where notices should be posted, posting of notices only in the county where the sale took place, where the mortgage expressly stated notice should be posted in the other county, rendered the sale void. Ib.

6. **Validity: Want of Recording.** Under Revised Statutes 1909, section 2861, declaring chattel mortgages to be invalid except as between the parties unless recorded before possession is taken, and sections 2887 and 2889, requiring conditional sales to be valid against creditors the seller of a motor car who received as payment notes reserving title and giving him a chattel mortgage is not, having withheld the same from record, entitled to record the same and take possession of the car as against creditors whose claims had meantime arisen, so where the debtor became a bankrupt a few days after the seller took possession, his lien is subject to attack by the trustee in bankruptcy. Stewart v. Asbury, 123.

CERTIFIED CHECK. See **Banks and Banking.**

COLLISION. See **Railroads.**

COMMON CARRIER. See **Carriers.**

COMMON LAW. See **Laws: Partnership.**

COMPENSATORY DAMAGES. See **Instructions.**

CONSIDERATION. See **Contracts.**

CONSTITUTIONAL LAW. See **Revenue.**

CONSTRUCTION OF STATUTES. See **Sheriffs and Constables.**

CONTINUANCE. See **Courts.**

CONTRACTS.

1. **Merger of, into Deed: Covenants.** Where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. And although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor, the law remits the party to his covenants in his deed, and he cannot recover on the contract because of a failure of title by reason of a forged deed in the chain of title in the absence of fraud or mistake. Frisbie v. Scott and Schwald, 131.

2. **Promise "When Able:" Validity: Burden of Proof.** A promise to pay for property purchased "when able" is a valid contract and can only be enforced when the promisor has become able; and the burden is on the promisee to prove that fact. Wheel Scraper Co. v. Spitcaufsky, 513.

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CONTRACTS—Continued.

3. If under a written contract, a bank commissioner's obligation to return plaintiff's money is already fixed, the promise to perform that obligation could not support a new promise made by plaintiff, because there would be no new consideration for that promise. Lebrecht v. New State Bank of Oklahoma, 642.

4. **Sale of Real Estate: Stakeholders.** Where one enters into a contract to sell real estate and the purchaser pays some amount as earnest money which is deposited with a stakeholder to be forfeited if he fails to comply with said contract, and the buyer does thereafter fail to fulfil the terms of the agreement, the seller may recover said earnest money from the stakeholder, as damages. Bachman v. Real Estate & Ins. Co., 674.

5. **Deeds: Acknowledgments: Release of Dower.** An acknowledgment by a married woman in a warranty deed, made in March, 1880, wherein she joined with her husband, the property intended to be conveyed being owned in fee by the wife, which recited that she executed the same and relinquished her dower in the real estate described in the deed, is valid and sufficient to convey the fee of the wife. Ib.

CONTRIBUTORY NEGLIGENCE. See **Master and Servant: Negligence.**

CONVERSION.

1. **Evidence: Ownership of Bank Stock: Case for the Jury.** Where plaintiff's testimony shows that her money went into the purchase of five shares of bank stock, and that defendant admitted that plaintiff owned five of the shares of stock which came into his possession, obtained her permission to sell them, and after doing so admitted that he held the money in his possession as belonging to her, *held* a case for the jury, though the testimony of plaintiff does not trace her money directly into the five shares of stock, which, she asserted, belonged to her and which were sold by defendant. Pledge v. Griffith, 303.

2. **Infants: Liability for Conversion.** If a minor retained and converted to his own use the proceeds of a sale of stock belonging to plaintiff, his plea of minority would not shield him from liability to plaintiff therefor. Ib.

CORPORATIONS.

1. **Principal and Agent: Agency: Acts of Promoters: Corporate Liability.** A corporation, formed August 6, 1914, and electing a promoter president August 25th, thereafter, who owned practically all of the stock, which promoter being under contract with another promoter and member of a firm of architects authorized to receive bids for the construction of a corporation building, to transfer a large part of the stock to him and others and put them in charge of the corporation, constitutes such acts as to charge defendant corporation with responsibility for the acts of such promoters, and render it liable for the failure of such firm of architects to return to a bidder a certified check received August 14, 1914, upon rejection of such bid. Fairbanks, Morse & Co. v. Market House Ass'n, 317.

2. **Dividends: Trustee: Statute of Limitations.** A defendant held in his hands a sum of money arising from dividends on certain

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CORPORATIONS—Continued.

stock which came into his possession as money belonging to the plaintiff or another. He acknowledged that he held the money for whoever was entitled to it. It was *held* that he was an express trustee and that the Statute of Limitations did not run against the claim against him. Moulden v. Train, 509.

COURTS. See **Administration.**

1. **Decisions of United States Courts as Controlling.** In determining the liability of a telegraph company on account of negligent delay in the transmission of an interstate message, the law must be construed as it has been construed by the federal courts touching the question. Diffenderffer v. W. U. Tel. Co., 48.

2. **Jurisdiction of Court: Estate Unsettled.** The appointment of an administrator for an estate, after the commencement of an action to partition lands belonging to such estate does not deprive the circuit court of jurisdiction to entertain such partition suit, but final decree thereon will be postponed until the estate has been fully settled or the court satisfied that there is ample property *aliunde* to satisfy all claims. Tanner v. Tanner, 145.

3. **Probate Courts: Powers: Jurisdiction.** In Missouri, the probate courts have no inherent powers, their powers being entirely derivative and they exercise such powers only as are conferred by or implied from legislation. Peck v. Fillingham, 277.

4. **Circuit Court: Probate Court: Suit to Construe Will: Jurisdiction.** The probate court has no jurisdiction of a suit to construe testatrix's will as to her intention whether or not incumbrances on realty devised should be paid off out of funds of the estate, such suit must originate in the circuit court. Ib.

5. **Criminal or Civil Case: Distinction.** A circuit court at the close of one term cannot continue an unfinished trial into a succeeding term of the same court in the same county then to be proceeded with, and there is no distinction in this respect between a criminal and civil case. Seal v. Kansas City Ry. Co., 498.

6. **Circuit and Probate Courts: Suit Against Administrator: Certification of Claims.** Furthermore, there is no rule of practice, or statute in Missouri, by which, in such case, on the failure of the claimant to establish his demand as a preferred claim, it is within the power of the circuit court to order it certified to the probate court for allowance. Real Estate & Building Co. v. Robinson, 515.

CRIMES AND PUNISHMENTS.

1. **Misdemeanor Cases.** Revised Statutes 1909, sec 5313, as to appeals in felony, cases, does not apply in misdemeanor cases in which the appeal is returnable as in a civil case under section 2047, making the appeal taken sixty days before the term returnable at the next term, and, if taken a shorter time before the next term, at the second term. State v. Chilton, 220.

2. **Criminal law: Appeal: Record: Requisites.** A defendant in a criminal case on appeal need not file a certified copy of the judgment or sentence and the order granting the appeal, but should first prepare and file his bill of exceptions and then direct certification by the clerk of a complete transcript. Ib.

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CRIMES AND PUNISHMENTS—Continued.

3. **Criminal law: Appeal: Record: Requisites.** Revised Statutes 1909, sec. 2048, providing for the short form of appeal, is not wholly applicable to criminal case, and to perfect an appeal, one convicted of a misdemeanor must file a perfect transcript as required by sections 5308 and 5309, and a printed abstract is insufficient. Ib.

4. **Bail: Appeal: Release on Bond.** One convicted of a misdemeanor who gives his appeal bond is entitled to his liberty on the bond. *Ib.*

5. **Record: Requisites.** There being no law prohibiting an appellant in a misdemeanor prosecution from filing a certified copy of the judgment and order granting appeal, he may do so, and may abstract the record, but the preparation of such a record does not relieve him of filing a complete long-form transcript. Ib.

6. **Criminal law. Appellate Practice: Absence of Bill of Exceptions: Review.** On appeal in a criminal case in the absence of a bill of exceptions, the appellate court is confined to an examination of the record proper. State v. Goldman, 416.

7. **Indictment and Information: Lotteries: Sufficiency of Information: Following Language of Statute.** An information charging that defendant willfully and unlawfully did sell, to a person whose name to the informant was unknown, a certain ticket and part of a ticket in a lottery and device in the nature of a lottery known as "country store," contrary to the form of the statute, etc., substantially following the language of Revised Statute of Missouri, section 4771, was sufficient. Ib.

8. **Indictment: Prima-Facie Evidence.** Indictment by a grand jury is prima-facie evidence of the existence of probable cause, unless such evidence is overcome by evidence showing that the indictment was obtained by false or fraudulent testimony, or through improper means, or by evidence showing that defendant through its agents, notwithstanding the action of the grand jury, did not believe defendant in this case to be guilty. Steppuhn v. Railroad Co., 571.

9. **Preliminary Examination.** The fact that plaintiff waived preliminary examination before the U. S. Commissioner was not a confession of probable cause for plaintiff's arrest. (The case of Vansickle v. Brown, 68 Mo. 627, explained.) Ib.

DAMAGES.

1. **Instructions: Measure of Damages.** In such action, where the petition averred and the proof showed that the stock claimed by plaintiff was sold for $600, and there was no evidence that defendant had received any dividends thereon, an instruction that if the jury found for plaintiff to assess the amount of her recovery at such a sum of money as they might find defendant received for the five shares or stock, not to exceed $750, with interest thereon, was erroneous. Pledge v. Griffith, 303.

2. **Excessive Damages: Loss of Husband and Father.** Where plaintiff's husband was a cement finisher at the time of his decease, and left surviving him plaintiff and their four minor children, a verdict of $7500 is not excessive, although the evidence failed to show what the earnings of deceased were at the time of his death. Most v. Goebel Const. Co., 336.

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DAMAGES—Continued.

3. **Measure of Damages: Injury to Reversion.** In an action of trespass on the case by a landlord for injury to the reversion by dumping earth on the premises, the measure of damages would be the depreciation, in the market value of the land after the earth was dumped thereupon, from its value prior thereto, unless the cost of removing the soil thus placed upon the land would be less than the depreciation in the value of the freehold. Thompson v. Paving Co., 356.

4. The Adamson Law merely substituted eight hours of labor as a day's work for the purpose of measuring the plaintiff's compensation as necessary for day's wage, with further requirement that he should not receive, for said eight hours' labor less that he had received for his specified day's task, and if it necessarily required more than eight hours to perform the specified task he should be paid *pro rata* for overtime. Nelson v. Railway Co., 635.

DAYS WORK.

DEEDS. See **Contracts.**

DEED OF TRUST. See **Taxation.**

1. **Right to Redeem: Day in Court.** In such suit a holder of a deed of trust of record, not notified when the lien matured, and not made a party to the suit until after expiration of the two-year period prescribed by article 6, section 25 of the Charter of the city of St. Louis, is not given his day in court by his right to redeem after judgment. Paving Co. v. Realty & Imp. Co., 226.

2. **Valid Release: Partners: Abstracts of Title.** A deed of trust may be validly released on the margin of the record by one of two parties to whom the note secured by such deed of trust is payable where such parties were owners of said note as partners. Bachman v. Real Estate & Ins. Co., 674.

DEMURRER. See **Appellate Practice.**

DEPOSITIONS. See **Evidence.**

DIVIDENDS. See **Corporations.**

DIVORCE.

1. **Domicile: Husband and Wife.** During the period of cohabitation between the husband and wife, the domicile of the husband is regarded as the domicile of the wife, for the purpose of establishing their identity as husband and wife. But the wife may, for the purpose of establishing venue to bring an action for divorce make herself a residence or domicile separate and distinct from that of her husband. State ex rel. v. Davis, 439.

2. To create a domicile or residence for the purpose of bringing an action for divorce two elements are fundamentally and absolutely necessary. These are actual bodily presence in the county or place combined with freely exercised intention of remaining there permanently, or for an indefinite time at least. The term residence means the actual bodily presence of the party, if that presence is coupled with the intention to remain permanently, or for an indefinite time. Ib.

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DIVORCE—Continued.

3. **Judgment of: Fraud: Action to Set Aside: Remarriage.** Husband and wife were divorced for her fault, after personal service on her. More than three years afterwards she brought a bill in equity to set aside the divorce and adjudge her support and maintenance, on the ground that the husband had wrongfully induced and influenced her to confess to adultery and consent to a divorce; and that after the divorce he continued marital relations with her. Before she brought her action the husband had remarried. After she brought it and after her appeal and submission of the cause to the appellate court, but before a decision, she married. It was *held* that by marrying she adopted the divorce and waived the fraud and abandoned that part of her action. Littlefield v. Littlefield, 456.

4. **Maintenance: Fraud: Waiver.** Where husband and wife are divorced for her fault and she brings a bill in equity to set aside the divorce for fraud and for support and maintenance, and before a final decision of such case marries, she thereby waives the fraud and adopts the divorce; and such divorce, for her fault, leaves her without right to maintenance, or support. Ib.

DOMICILE. See **Attachment: Husband and Wife.**

DRAM SHOPS.

Sureties on Bond: Liability for Personal Injuries. The plaintiff, a newspaper reporter, was assaulted and injured by the bar-keeper of a dramshop and thereafter sued the saloon-keeper and his bondsman for damages. It was *held* that the relator, having suffered a direct and personal injury from the positive and intentional act on the part of the dramshop's agent and bartender, in direct violation of the duty imposed by statute and guaranteed by the bond, namely "to keep at all times an orderly house," is entitled to recover on the dramshop-keeper's bond for a direct and positive violation thereof. State ex rel. v. Nailer et al., 470

EMINENT DOMAIN.

Exercise of Right: Regularity of Proceedings. In order to exercise the right of eminent domain under the statute, all the requirements must be substantially followed, and every jurisdictional fact must affirmatively appear on the face of the record, and nothing will be supplied by intendment or implication. Meyers v. Williams, 21.

EQUITY. See **Administration.**

1. The payment of a debt by one not the debtor absolutely extinguishes the debt if there is no agreement that the security therefor shall be transferred and kept alive for the benefit of such payer. But equity, through the doctrine of subrogation, will effect the reimbursement of the payer by substituting him in the place of the creditor where the payer is compelled to pay in order to protect his own rights or to save his own property. Jacobs & Feller v. Webster, 604.

2. In order that the equitable doctrine of subrogation may be invoked, the payment must have been made by one who at the time had, or in good faith, supposed he had, an interest in discharging the demand. Ib.

EQUITY OF REDEMPTION. See **Homestead.**

ESTOPPEL. See **Insurance: Limitations.**

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EVIDENCE.

1. **Admission: Testimony.** Where insured testified that after a fire a new barn was built which cost $900, but there was no evidence that it was substantially the same as the old barn, there was no admission that the old barn was duplicated for $900, which was less than the face value of the policy. Horine v. Royal Ins. Co., 107.

2. **Admissions by Agent.** In an action against a railroad company for injuries to a shipment of live stock, testimony as to admissions made by a brakeman of the defendant company, but who was not running on the train carrying the shipment, is inadmissible; for the admissions of an agent can only be received against his principal when they are made as a part of the work or business he is doing or transacting. Robinson v. Bush, 184.

3. **Actions: Evidence: Jury Question.** In an action against a railroad company for injuries to a shipment of live stock, the question whether the company was guilty of negligent operation of the train transporting the stock, *held* for the jury. Ib.

4. **Presumption of death.** Presumption of death arises where a person has absented himself for seven years and has not been heard from. Warren v. Railway Conductors of America, 200.

5. **Evidence: Owners Not Named in Tax Bills: Proof of Aliunde: Basis for Lien.** While general taxes in favor of the State (R. S. 1909, sec. 11385) are a continuing lien against the land no matter who is the owner nor in whose name assessed, yet in the sense of the said charter provisions, the beneficiaries in a deed of trust are regarded as owners of the property, and it is essential, when others than those named in the tax bill appear to be owners, that proof *aliunde* of the bill be made in order to effect the right of such owners not named therein. Paving Co. v. Realty & Imp. Co., 226.

6. **Admissions of Codefendant.** In action against a school of osteopathy and a member of its faculty, who, it is alleged negligently broke plaintiff's sternum, the court properly permitted plaintiff to relate a conversation to the effect that, when she charged defendant member with responsibility for her injuries, the accusation was not denied by him. Atkinson v. Am. School of Osteopathy, 251.

7. **Hypothetical Questions: Evidence to Support.** Every party has the right to place before the jury the scientific inferences properly deducible from such facts as the evidence tends to prove, subject to the contingency that the jury shall find such facts to be as claimed. Ib.

8. **Witnesses: Experts: Cross-Examination: Reading from Books.** In an action against a school of osteopathy and a member of its faculty, who it is alleged negligently broke plaintiff's sternum while giving her treatment, it was not error to permit counsel on cross-examination to contradict a witness, by asking whether "Hulett," whom he had testified was a recognized authority, did not state that direct violence might cause depression, resulting in fractured cartilage, etc., the book being recognized and used as a text by defendant school for years, and the witness having previously thereto testified that according to the teachings of the defendant school there could be no fracture of the cartilage of the ribs. Ib.

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EVIDENCE—Continued.

9. **Expert Witnesses.** Counsel may put to an expert, after his competency has been established, a question in which the things which the evidence adduced tends to prove, and which counsel claims to have proved, are stated as a hypothesis and the witness is asked to explain the conclusions which in his opinion result. Ib.

10. **Lay Witness: Opinions: Disease: Competency.** Permitting a lay witness, who had herself been a sufferer with asthma for years, to state that she had never discovered symptoms of asthma in plaintiff before entering defendant's school, was not prejudicial error. Ib.

11. **Admissions of Codefendant.** Statements of a codefendant, while treating plaintiff a day or two after the injury, to the effect that he was the "cause of all this suffering," is admissible against him. Ib.

12. **Witnesses: Expert Witness' Fees: Allowance by Court.** Real estate brokers as expert witnesses are not entitled to demand more than the usual witness fees, and a wife in a suit for separate maintenance could not make a binding contract to pay more than the usual witness fees, but they were entitled to reasonable compensation for such services as examining the property and gathering information and data on which to base their opinions as to its value, and for such expenditures plaintiff was entitled to a reasonable and proper allowance.
Held, by REYNOLDS, P. J., dissenting, that the value of the services of the real estate agents who examined the property at the instance of appellant had same been before the court, the court could not and should not have made an allowance in favor of appellant for these services. Klepper v. Klepper, 294.

13. **Ownership of Bank Stock: Evidence: Admissibility.** In a suit to recover part of the proceeds of bank stock, sold, plaintiff claiming that she owned five shares of such stock, the court improperly refused to permit the defendant's mother to testify that plaintiff did not claim to have furnished any of the money which went into the stock purchased. Pledge v. Griffith, 303.

14. **Admissions of Infant.** Such admissions of defendant were admissible against him, though he had not attained his majority when the admissions were made. Ib.

15. **Transactions with Others: Admissibility.** In an action to recover bidder's deposit held by defendant's architects after rejection of bid, the admission of evidence of another bidder's transactions with these architects, *held* not error. Fairbanks Morse & Co. v. Market House Ass'n., 317.

16. **Newspaper Article: Admissibility.** In such action, a newspaper article concerning the building to be erected, facts for which were gathered from the architects to whom defendant's promoter referred the reporter for information, *held* properly admitted. Ib.

17. **Knowledge of Principal of Acts of Agent: Architects Receiving Deposits: Case for the Jury.** Evidence examined and *held* that there is substantial evidence in the case sufficient to submit to the jury, and to warrant the finding that the promoter and afterwards president of defendant company, had knowledge that architects employed by him and later by the defendant were receiving bids by contractors and requiring a guaranty deposit to be returned

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EVIDENCE—Continued.

if the bid was not accepted. Fairbanks, Morse & Co. v. Market House Ass'n. 317.

18. **Depositions: Admissibility of Evidence: Fixing Date of Incident.** The objection to a question and answer in a deposition that the time of a stated conversation between witness and defendant company's president was not fixed, was properly overruled, where the subsequent portion of the deposition fixed the time. Ib.

19. **Harmless Error: Depositions: Conclusions.** The conclusion expressed by a witness in his deposition that he knew that defendant company's president knew of the exaction of guaranty checks from bidders was harmless, where the witness fully stated the facts on which the conclusion was predicated. Ib.

20. **Question for the Jury.** Under such statute, whether the building on which deceased was employed as a cement finisher was being erected or repaired, *held* a question for the jury. Most v. Goebel Const. Co., 336.

21. **Confidential Communications to Public Officers: Privileged: Public Policy: Mandamus.** Under article 14, section 2, of the charter of the city of St. Louis, establishing a complaint board and authorizing such board to receive complaints against any department, board, division, officer, or employee of the city, and recommended to the proper city or state authorities any action deemed advisable, *held* that communications by citizens to the complaint board, covering the conduct of public officers and employees, are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated. [ALLEN, J., dissenting.] State ex rel. v. Tune et al., 404.

22. **Personal Injury: Plaintiff's Inexperience: Pleading.** In a personal injury case it is error to allow plaintiff to prove his inexperience unless it was pleaded and proven that the defendant knew he was. Crane v. K. C. So. Ry. Co., 448.

23. **Control of One Party: Presumption: Exception.** The rule that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted," does not apply against a party not calling a witness where such witness is equally accessible, or under the control of the other party. Ib.

24. **Personal Property: Parol Evidence.** An express trust may be had in personal property without a writing, and may be established by parol; though if the subject of the trust is real estate, to satisfy the Statute of Frauds it must be in writing. Moulden v. Train, 509.

25. **Jury: Not to Speculate or Guess: Evidence.** Telling the jury in an instruction that in determining whether insured died from excessive use of morphine, they are not to speculate or guess, is not error. Holmes v. Protected Home Circle, 528.

26. **Evidence.** In an action by a creditor, evidence *held* to warrant the finding of the chancellor that a conveyance of corporate stock by a husband to his wife was in good faith and upon full consideration. Beaumann v. Horn, 555.

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FELLOW-SERVANTS. See **Master and Servant: Negligence.**

FIRE INSURANCE. See **Appeal and Error: Insurance.**

FIXTURES. See **Livery Stables.**

FOREIGN CORPORATIONS. See **Corporations.**

FOREIGN STATE. See **Limitations.**

FRATERNAL INSURANCE. See **Insurance.**

FRAUD. See **Vendor and Purchaser.**

FRAUDULENT CONVEYANCES.

1. **Sales: Bulk Sales Law: Construction of Statute.** In construing the Bulk Sales Law, session acts of Missouri, 1913, p. 163, a statute penal in its nature, no sales are to be included as coming within its purview unless clearly within its terms, as sales in bulk laws, being in derogation of the common law, and of a person's right to alienate his property without restrictions, are to be strictly construed. Balter and Miller v. Crum et al., 380.

2. **Fraud: Creditor.** The fraudulent conveyance of a homestead affords no right to creditors to attack it, since they have no claim on such homestead and in consequence, cannot be defrauded by its conveyance. Lawson v. Riley, 453.

3. **Debtor: Protection: Incumbrance: Creditor.** The debtor may protect his homestead by paying an incumbrance so long as he does not increase it beyond the limited value, without giving a creditor a right to follow the sum paid and apply it on his claim. Lawson v. Riley, 453.

4. **Husband and Wife.** Conveyances from husband to wife are to be closely scrutinized to see that they are not made for the purpose of defrauding creditors. Beaumann v. Horn, 555.

GARNISHMENT. See **Interpleader.**

GROWING CROPS. See **Replevin.**

HIGHWAYS.

1. **Establishment: Payment of Damages: Statutes.** The provision in R. S. 1909, sec. 10437, that petitioners for the establishment of a road shall pay into the county treasury the probable amount of damages, is jurisdictional and cannot be replaced by the filing of a bond. Meyers v. Williams, 21.

2. **Remedies at Law: Irreparable Injuries: Insolvency.** Failure of petitioners for the establishment of a road to pay into the county treasury the probable amount of damages, as prescribed by R. S. 1909, sec. 10437, is ground for injunction; it not being necessary to show insolvency. Ib.

HOMESTEAD.

1. **Equity of Redemption: Payment: Creditor: Equity.** One may have a homestead in an equity of redemption, and if he pays the mortgage, he still may hold the homestead, thus relieved of the incumbrance, and creditors have no right to follow the sum paid in discharge of the incumbrance, into the land. Lawson v. Riley, 453.

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HOMESTEAD—Continued.

2. **Incumbrance: Payment: Creditor.** A man resided on his homestead upon which there was an incumbrance for $480. He made a voluntary conveyance of the homestead to his daughter, subject to his incumbrance, and then, with independent means, paid off the incumbrance. She then conveyed back to him. A judgment creditor for $100 sought, by bill in equity, to charge this judgment as a lien on the homestead. It was *held* he could not do so. Lawson v. Riley, 453.

HUSBAND AND WIFE.

1. **Domicile: Right of Husband to Fix: Presumption.** The husband as the head of the family, has the right to fix the domicile or matrimonial residence without the wife's personal agreement or consent thereto, and the wife is bound to follow her husband when he changes his residence, provided the change is made by him in the *bona fide* exercise of his power. The law presumes that the domicile of the husband is the domicile of the wife and that the residence of the wife follows that of the husband. Ware v. Flory, 60.

2. **Separate Maintenance: Suit Money: Allowance of Expert Witness Fees.** Where a wife in a suit for separate maintenance hired real estate brokers to examine property and appraise it, in the absence of showing of the reasonable value of their services, she was not entitled to an allowance for their fees. Klepper v. Klepper, 294.

3. **Attorneys' Fees: Allowance.** The matter of the allowance of counsel fees to a wife in a suit for separate maintenance is one resting largely in the discretion of the trial court, and while this discretion is judicial, and subject to review, the appellate court cannot direct a larger allowance unless it appear that such discretion was abused, or that the allowance is so manifestly inadequate as to amount to a denial of plaintiff's right in the premises. Ib.

4. Under Revised Statutes 1909, section 8295 providing for security for separate maintenance of the wife, the circuit court, at a subsequent term, may require security as to the future payments, although the original decree did not require such security, since the court is empowered to make such further orders as justice may require. Ib.

5. And where the allowance is one payable monthly and the husband's property consists almost wholly of personalty, security for such payments should be required. Ib.

6. **Separate Maintenance: Security.** Section 8295, Revised Statutes 1909, requiring separate maintenance and security therefor, contemplates that the husband shall give such security for the payment of the maintenance allowed the wife as is reasonably necessary to protect her in obtaining the fruits of her judgment. Ib.

7. **Torts of Wife: Statute: Common Law.** The following statute was enacted in Missouri in 1915: "For all civil injuries committed by a married woman, damages may be recovered against her alone, and her husband shall not be responsible therefor, except in cases where, under the law, he would be jointly responsible with her, if the marriage did not exist." It was *held*, that this statute repealed the common law, as to torts of the wife and put liability on her where formerly it did not exist, and took liability from the husband where formerly it did exist. Moore v. Doerr, 428.

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HYPOTHETICAL QUESTIONS. See **Evidence.**

INDEPENDENT CONTRACTORS. See **Landlord and Tenant.**

INDICTMENT. See **Crimes and Punishments.**

INFANTS. See **Conversion.**

INFERENCES. See **Practice.**

INJUNCTION. See **Taxation.**

Mandatory: Equity: Submission of Issue of Fact to Jury. Plaintiff refused to pay a gas bill claiming that it was exorbitant. Defendant thereupon shut off his gas. Plaintiff then applied for and obtained a restraining order which afterward became a temporary injunction. Thereafter defendant filed an answer to the merits and the court then made an order that issues of fact be framed between plaintiff and defendant for submission to the jury. Defendant declined to do this and the court thereupon ordered the temporary injunction made permanent. It was *held*, that the trial court erred in rendering judgment against defendant without a hearing. Randolph v. Gas Co., 425.

INSANE PERSONS. See **Administration.**

INSPECTION OF BOOKS. See **Attachment: Practice.**

INSTRUCTIONS. See **Damages: Landlord and Tenant: Master and Servant: Practice.**

1. **Defenses: Issues.** Although an insurer answered that a policy was absolutely void because insured was not sole owner, but only had a dower interest, the court properly refused to sustain a demurrer to the evidence which would give plaintiff nothing, where the insurer tendered a certain amount in court as being sufficient to cover insured's interest in the property. Tiffany v. Queen Insurance Co., 36.

2. **Insurance: Acceptance of Policy: Conditions.** The acceptance of a fire policy is equivalent to a declaration that a provision in the policy that insured was the sole owner was true, although insured never saw the policy or signed an application. Ib.

3. **Trial: Issues.** Where an insurance company admitted liability in some amount, and made a tender in court, the court properly refused to instruct that offers of compromise should not be construed as an admission of liability "in any amount." Ib.

4. **Variance.** An instruction *held* not to proceed on the theory of ratification of unauthorized act of architects in receiving bidder's guaranty deposits, thus constituting a departure from the theory of the case defined in the petition. Fairbanks, Morse & Co. v. Market House Ass'n, 317.

5. **Defining Terms: Burden.** Using the word "burden" in an instruction, undefined, is not reversible error, such word being a plain, common word, easily understood by any one fit to sit on a jury. Holmes v. Protected Home Circle, 528.

6. **Impartial Attorney.** An instruction which tells the jury that to entitle the defendant to avail itself of advice of counsel as a defense to the second and third counts of plaintiff's petition, it must be shown that the defendant in good faith sought the ad-

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INSTRUCTIONS—Continued.

vice of an attorney, and at the time of doing so believed said attorney to be *impartial*, where such attorney was one regularly employed by defendant, is erroneous. Steppuhn v. Railroad Co., 571.

7. An instruction which assumed that one is the agent of a defendant and acting within the scope of his employment is erroneous, but where the defendant joined in the same error it is not entitled to complain. Ib.

8. **Damages: Measure of.** Where an instruction gives the measure of damages as the difference between the market value of meat in good condition on arrival at destination, and its reasonable value in the damaged condition is erroneous, where it is contrary to the provisions of the shipping contract regarding such damages. Cudahy Packing Co. v. Bixby et al., 589.

9. **Street Railways: Rate of Speed.** Where the plaintiff's instruction to the jury is erroneous, but such error is afterwards cured by the defendant's instruction, which fully explained the plaintiff's instruction so that the jury could not have been misled, it will not constitute reversible error. Davis v. K. C. Ry. Co., 621.

10. **Damages: Statutes.** Sections 5426-5427, Revised Statutes 1909, are remedial but under them aggravating circumstances may be taken into consideration and punitive damages allowed where there is shown to exist willfulness, malice and recklessness, etc. Section 5425, Revised Statutes 1909, is both penal and remedial and it is proper to instruct the jury in a case under this section, that they may take into consideration all the facts and circumstances in evidence bearing upon the killing. Miller v. Harvey, 627.

11. Where a court gives instructions that assume disputed facts, such instructions will be held erroneous. Ib.

12. **Compensatory Damages.** Where an instruction on the measure of damages told the jury that "they shall take into consideration *in connection with all the facts in evidence* the nature and extent of his injuries," it was not erroneous on account of the use of the words in italics, as such words do not call for punitive damages. Griffin v. K. C. Ry. Co., 682.

INSURANCE.

1. **Conditions in Fire Policy: Waiver: Estoppel.** Evidence *held* sufficient to warrant a finding that a fire insurance company's agent knew that insured only had a dower interest in a house, and that the company waived and was estopped to set up a defense that she was not sole owner; the agent having himself made out the application, which was not signed by insured. Tiffany v. Queen Insurance Co., 36.

2. **Instructions: Total Loss.** In action on policy insuring a barn consisting of a main building and several extensions, a general instruction limiting recovery to cost of repairs if the building could have been repaired was sufficient, and it was not necessary to instruct on partial loss as to the various additions to the building. Horine v. Royal Ins. Co., 107.

3. **Fire: Total Loss.** In view of R. S. 1909, sec. 7020, as to valued policies, on whose barn was insured in several companies could re-

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INSURANCE—Continued.

cover on a valued policy the full amount of the policy regardless of other insurance. Ib.

4. **Fire Insurance: Total Destruction of Building: "Wholly Destroyed."** There need not be an absolute extinction of all the parts of a building in order for it to be "wholly destroyed." Ib.

5. **Fire Insurance: Instructions: "Total Loss."** In an action on fire policy, instruction that if the building could have been repaired with materials of like kind and quality, and so put in as good condition as before the fire, plaintiff could recover only the cost of repairing the building, sufficiently defined "total loss" in a negative way. Ib.

6. **Evidence: Sufficiency.** Evidence *held* to show mutual mistake in an insurance policy upon property of the wife drawn in favor of the husband which the insurer's agent told plaintiff was valid in spite of the variance in ownership. Ib.

7. **Rebate of Premiums: Instrument as Cloak: Sufficiency of Evidence.** But, in such action, when plaintiff's evidence shows, without contradiction or dispute, that it was not intended that such instrument evidence a bona-fide obligation of defendant for the unpaid portion of the premium mentioned, but that it was designed merely to serve as a cloak for a rebate in violation of section 6934, Revised Statutes 1909, the trial court did not err in directing a verdict for defendant. Patten v. Miller, 287.

8. **Life Insurance: Evidence: Illegal Transaction: Case for the Jury.** In an action by an assignee on an instrument for the payment of money given to an insurance agent by an insured, if there is any substantial evidence in the record tending to support plaintiff's theory that such instrument was given for a valid indebtedness, and not as a mere cloak for an illegal transaction, then the case is for the jury. Ib.

9. **Temporary Violation: Forfeiture: Warranty.** Temporary violation of the provisions of a policy will not forfeit it, if there is no violation at the time of the loss; unless such provision is a warranty. Berryman v. Motor Car Ins. Co., 503.

10. **Automobiles: Warranty: Temporary Violation: Materiality.** A statute (Secs. 7024, 7025, R. S. 1909) declared that a warranty in a policy of insurance which was not material to the risk, should be considered as merely a representation. A policy insuring an automobile against fire contained a warranty that the machine would not be hired out. It was hired out one or more times, but was not hired on the trip in which it burned. It was *held* that such violation of the warranty did not forfeit the policy and that the provision called a warranty was really not a warranty as applied to the loss and was therefore not material to the risk. Ib.

11. **Fraternal Benefit Insurance: Cause of Death: Question for the Jury.** Where the testimony in the case as to the cause of insured's death was conflicting, and there being substantial evidence to sustain the theory of plaintiff, that made it a case for the jury. Holmes v. Protected Home Circle, 528.

12. **Cause of Death: Evidence.** An instruction that told the jury plaintiff was entitled to a verdict unless the jury found and believed from the evidence that insured came to his death from the excessive use

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INSURANCE—Continued.

of morphine, presented the issue fairly, clearly, and intelligently. Holmes v. Protected Home Circle, 528.

13. **Fraternal Benefit Insurance: Proofs of Death: Cause of Death: Statements of Physician not Conclusive.** Where there was a conflict between the statement in the proofs of death made by the beneficiary and that made by the physician, it could not be said that filing the certificate of the physician constitutes such an admission against interest as to be conclusive upon plaintiff in the action. Ib.

14. **Premiums not Recoverable.** When insured received in consideration of his premiums paid, valid policies of insurance, he cannot recover the premiums or any part thereof. Landau v. N. Y. Life Ins. Co., 544.

15. **Life: Premiums: Rebates: Validity of Policy: Construction of Statute.** Although section 6934, R. S. 1909, prohibits discriminations and rebates or any special favor as an inducement to the taking out of a policy of life insurance, and section 6935 provides a penalty for the violation of section 6934, yet where a policy of insurance is executed and delivered, the contract of insurance itself is neither illegal nor void, even though the insured is promised a rebate on the premiums. Ib.

16. **Fire: Trustee's Sales.** The plaintiff who is owner of a house and lot, insured the house against fire with the defendant. The defendant placed upon the policy a mortgage clause to cover a deed of trust upon the property. Two days after the sheriff, acting as substitute trustee, sold the property at auction to one Thompson, the house was destroyed by fire, but Thompson afterwards refused to pay the purchase price or accept the title, and the plaintiff sued the defendant to recover the insurance. It is *held*, that there was no change of interest in the property by reason of sheriff's sale for the reason that the sale was not binding on Thompson, or the sheriff, and that in order that there be a change of interest there must be something done by the sheriff, or the bidder, at the time of trustee's sale at least sufficient upon which to enforce an action for specific performance. Ogden v. Fire Ins. Co., 611.

17. **Fire Insurance: Liability of Insurer: Measure of Damages: Partial Destruction.** In such action, where the property was partially destroyed, the amount expended by insured for repairs does not constitute the measure of damages. Tinsley v. Aetna Ins. Co., 693.

18. **Liability of Insurer: Effect of Other Insurance.** Where a fire insurance policy did not contain a *pro-rata* clause, insured may recover the full amount of his loss from the insurer, although there was other insurance on the property. Ib.

19. **Liability of Insurer: Partial Loss: Measure of Damages.** Under section 7022, Revised Statutes 1909, providing that, where there is partial destruction or damage to property, covered by insurance, insured is entitled to recover an amount equal to the damage done to the property, the measure of damages for partial loss by fire is the difference between the reasonable value of the property immediately prior to the fire and the reasonable value thereof, immediately after the fire. Ib.

20. **Construction of Policy: Provisions in Violation of Statute.** Provisions in a fire insurance policy, requiring insured to repair the

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INSURANCE—Continued.

property in case of a partial loss, and undertaking to limit the recovery by a co-insurance feature, with further deductions in certain instances, being directly in conflict with section 7022, Revised Statutes 1909, are wholly ineffectual. Ib.

21. **Fire Insurance: Nature of Policy: Laws Applicable: Fire Insurance on Steamboats.** Under section 6995, Revised Statutes 1909, placing fire insurance on ships, steamboats, and other vessels in the same class with insurance on houses, buildings, merchandise, and furniture, a policy of insurance, delivered in this State to a resident of the State, insuring a steamboat against fire, is a fire insurance policy, and governed by the fire insurance statutes of the State. Ib.

22. **Fire Insurance: Forfeiture: Waiver.** Where the insurer, in any negotiations or transactions with the insured after knowledge of facts which would otherwise work a forfeiture, requires the insured, in compliance with the provisions of the policy to do some act or acts, incurring trouble or expense, the right to insist upon a forfeiture will be thereby waived. Ib.

23. **Actions on Policy: Pleading: Special Defenses Must Be Pleaded.** Insurer, seeking to avoid payment of the full amount of loss because of other insurance, such defense is an affirmative defense which must be specially pleaded, if defendant desires to rely thereupon. Ib.

24. **Statutory Provisions.** Pertinent statutory provisions in force when the policy takes effect become as much a part of the contract of insurance as if embodied therein. Ib.

25. **Nonwaiver Agreement.** The signing by insured of a nonwaiver agreement to prevent a waiver from arising by any action of the insurer in investigating the cause of the fire and ascertaining the amount of the damage, does not protect insurer against waiver, where with knowledge of facts entitling it to a forfeiture, insurer's adjuster required insured to incur trouble and expense in order to comply with the provisions of the policy. Ib.

INTERSTATE SHIPMENTS. See **Carriers.**

INTOXICATING LIQUOR. See **Damages: Mandamus.**

Under sections 7227, 7228 and 7229, Revised Statutes, 1909, it is unlawful to keep, store or deliver for, or to any person, any intoxicating liquor in Adair county, except in those instances where a person has ordered the liquor for his own or family use and where such liquor is sent direct to the person using same. State ex rel. v. Q., O. & K. C. R. R. Co., 668.

INTERPLEADER. See **Practice.**

1. **Not Entitled to Allowance of Attorney's Fees.** But such attorney's fees cannot be allowed to one becoming an interpleader in a case under section 2439, Revised Statutes 1909, in a garnishment case under execution. McConnell v. Piano Co., 272.

2. **Garnishments: Costs: Attorney's Fees Allowed and Taxed as Costs.** Under section 2436, Revised Statutes 1909, attorney's fees may be allowed in favor of a garnishee in garnishment on execution as well as garnishments on attachment, which fees are to be taxed as costs. Ib.

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INTERSTATE COMMERCE. See **Telegraphs and Telephones.**

IRREPARABLE INJURY. See **Highways.**

JOINT TORTFEASORS. See **Negligence.**

JUDGMENT. See **Divorce.**

1. **Judgment Against Two Defendants: Reversed as to Both.** Where the appellate court finds that one of two defendants is entitled to a reversal of a judgment obtained against both, the judgment must be reversed as to both, notwithstanding the error causing the reversal was injected into the case by the other defendant and not by the plaintiff. Knox v. M. K. & T. Ry. Co., 64.

2. **Vacating Record of Satisfaction of.** Vacating the record of satisfaction was a mere incident to the setting aside of the judgment, because the moment the judgment was set aside it ceased to exist. The purpose of the acknowledgment of satisfaction is to destroy the lien on the property of the judgment debtor. Destruction of the judgment destroys the lien thereof. Warren v. Railway Conductors of America, 200.

3. **Erroneous Judgment.** Where a party has been wronged by an erroneous judgment which is reversed on appeal, it is not necessary for the party seeking restitution of what he has lost to bring a separate action, but all the parties being in court, the court will right the wrong with all possible speed. Ib.

4. **Vacation of Judgment: Parties.** Judgment of restitution should not be rendered against one who was not entitled to any part of the judgment, and who had received no part thereof. Warren v. Railway Conductors of America, 200.

5. **Voluntary Payment of.** Money paid upon a judgment with full knowledge of all the facts cannot be recovered. Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either and the payment is made to prevent it. But money paid with full knowledge of all the facts and without fraud cannot be recovered because of ignorance as to legal liability. Money voluntarily paid to satisfy a judgment afterwards reversed cannot be recovered where it appears that the original claim was a just one. There are cases in which the right of recovery has been maintained although the judgment was voluntarily paid on the ground that although the payment was voluntary yet defendant having received it of the plaintiff to which in *ex aequo et bono* he was not entitled, the same was recoverable as for money had and received. On the other hand money paid in satisfaction of a judgment afterwards vacated and the party to whom it was paid was not in equity entitled thereto, may be recovered. Ib.

6. **In Rem: Personal: Estate.** An allowance in the probate court of a claim against an insane person accruing while he was sane is in the nature of a proceeding *in rem* to be considered a judgment against the estate and not personal against the ward afterwards restored. Johnson v. Kaster, 501.

7. Where a purported judgment of a committing magistrate of a State court, on its face, shows a form with blanks reserved for in-

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JUDGMENT—Continued.

serting material things necessary to a judgment, with nearly all the blank spaces unfilled, including most of the dates, and concluded "turned over to the Federal authorities," *held*, the alleged judgment was so indefinite that it cannot be considered a judgment. Steppuhn v. Railroad Co., 571.

KITING CHECKS. See **Banks and Banking.**

LANDLORD AND TENANT.

1. **Question for Jury.** Where a tenant from month to month had been such for a great many years and the landlord makes repairs that lasted two years, it was a question for the jury whether the landlord had discharged his duty to the tenant in making repairs that lasted only two years. Vollrath v. Stevens, 5.

2. **Instructions: Repairing Premises.** An instruction which told the jury that if materials used by a landlord in making repairs to rented premises were unsuitable, insufficient and defective and that the landlord failed to replace any weak or rotten supports and flooring with reasonably safe supports, the tenant might recover damages received when the steps and flooring of the premises gave way two years after the landlord had voluntarily made repairs, was erroneous because the landlord was only bound to use ordinary care in doing these things. Ib.

3. **Independent Contractor: Damages.** If a lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant and the rule concerning independent contractors has no application, the accident having happened long after the repairs were made and accepted by the landlord. Ib.

4. **Damages: Personal Injuries.** A landlord is under no obligation to make repairs to premises let, in the absence of a written agreement so to do, but if he voluntarily undertakes to make them he is bound to exercise ordinary care to see that the work is not negligently done and that they will last a reasonable length of time under the circumstances. Ib.

5. **Defective Repairs: Misfeasance.** When a landlord voluntarily assumes to repair defective premises, he takes upon himself the burden to use ordinary care to make such repairs in such a manner that they will last a reasonable length of time and in discharging such duty, if he fails to remove material that should have been removed to make the place reasonably safe, he is guilty of misfeasance and not non-feasance. Ib.

6. A subterraneous recess under a public sidewalk, unknown to a tenant of adjacent premises, the landlord having said nothing of its presence and there being nothing present to suggest that it actually existed and it not being necessary to the enjoyment of the premises, is not an appurtenance that the tenant was required to keep in repair. Sands v. Kansas City, 13.

7. **Real Estate: Appurtenances: Subterraneous Recess.** Where a tenant rents premises and appurtenances thereto and nothing is reserved by the landlord and nothing said as to upon whom shall rest the burden of keeping them in repair, the duty is on the tenant to keep them in repair and the obligation is solely upon him to look and see whether the premises remain in repair. Ib.

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LANDLORD AND TENANT—Continued.

8. A mortgagor who, after default in payment and after notice of sale under the terms of the mortgage, but before sale, leases the mortgaged premises to a tenant who knew the facts, is not entitled to the benefit of the proviso in section 2841, R. S. 1909. State Bank of Trenton v. Knott, 90.

9. The object of the proviso in section 2841, R. S. 1909, regarding growing and unharvested crops on lands foreclosed was to protect the tenant who had the growing crop at the time of the sale of the land, whether he be the tenant of the mortgagor himself, or the tenant of his grantees, and therefore the mortgagor's grantees immediate or remote, are included within the meaning of the words "his personal representatives." Ib.

10. **Lack of Possession: Trespasser: Injury to Reversion.** Where the owner of land was out of possession, the entire premises being in the exclusive possession of a tenant, he cannot recover in trespass as for a wrong committed against the possession, though, as an owner out of possession, he may have his action against a trespasser for an injury done the reversion. Thompson v. Paving Co., 356.

11. **Use of Land under License from Tenant.** An owner of land, in possession of a tenant from month to month, can have no cause of action against defendants for their mere use of the land for dumping purposes or otherwise, without injury to the reversion, under license from the tenant; the evidence showing that the relation of landlord and tenant did not exist between plaintiff and defendants. Ib.

12. **Use and Occupation: Relation of Landlord and Tenant.** An action for use and occupation of land cannot be maintained, unless the relation of landlord and tenant exists between the parties, founded on agreement express or implied. Ib.

13. **Injury to Reversion: Nature of Action.** At common law, a landlord's action for an injury done to the reversion was technically not an action of trespass, but of trespass on the case, a distinction without importance under the Missouri code procedure. Ib.

14. **Constructive Eviction: Nuisance.** Where a tenant rents a part of a building and the landlord thereafter rents another part of said building to another tenant for a lawful purpose from month to month not knowing the character of the tenant, and afterwards a nuisance, such as a house of prostitution, is maintained by the landlord's sufferance, connivance or consent, by reason of the fact that the landlord learns of the house of prostitution and fails, upon complaint of the first tenant to put out the objectional tenant, the landlord is guilty of a constructive eviction of the first tenant who is forced to move on account of the said nuisance. Lancashire v. Garford Mfg. Co., 418.

15. **Option: Holding Over: Equity: Original Lease.** Where a lease for three years provides for an extension for two years, at the tenant's option, and he hold's over, he will be considered as holding under the original lease, and will not need the aid of a court of equity to maintain his right to the premises, since all of his rights may be asserted at law in defense in an action for unlawful detainer. Medicus v. Altman, 466.

16. **Renewal: Unlawful Detainer: Injunction.** Where a lease provides for a renewal in the sense that a new lease is to be executed and

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LANDLORD AND TENANT—Continued.

the landlord refuses to renew and brings unlawful detainer against the tenant, before a justice of the peace who has not equity jurisdiction, the tenant may by bill in equity enjoin the prosecution of the unlawful detainer action. Ib.

17. **Option: Extension: Holding Over: Election.** A tenant's lease was for three years, with a provision for an extension at his option, for two years more. The tenant never notified the landlord he desired the extension, but he held over and paid rent to the landlord for several months. It was *held* that this was an election to take the extended term; and that the original lease was a present demise of the extended term. Ib.

18. **Extension: Same Terms: Original.** If there is to be a renewal of a lease as distinguished from an extension, it must clearly appear from the writing that such was the intention of the parties; and where the renewal was to be on the same terms as the original, it will be regarded merely as an extension of the original. Ib.

LAWS.

Statutes: Common Law Right. The statute is a qualification and restraint upon the artizans common law right to a lien. Butterworth v. Soltz, 507.

LEASE. See **Landlord and Tenant.**

Unrecorded Notice: Possession. A became the owner of real estate upon which there was an unrecorded lease. He knew the tenant was in possession and accepted rent from him for several months. It was *held* that this justified a finding that A had notice of the lease. Medicus v. Altman, 466.

LICENSE. See **Landlord and Tenant.**

LIENS. See **Municipal Corporations: Taxation.**

1. **Effect.** Under Bankruptcy Act July 1, 1898, sec. 67e, the effect to be given an unrecorded chattel mortgage, where possession of the article was not given the martgagee, must be determined under the law of the State in which the case arises. Stewart v. Asbury, 123.

2. **Right to Lien: Assertion Within Time Limit.** A special tax bill is not prima-facie evidence of the right of a lien against a mortgage not named therein, and unless the lien is asserted while the right of the lien exists, and subsequently established, there is naught from which redemption should be made; otherwise upon foreclosure the land is not chargeable with the lien. Paving Co. v. Realty & Imp. Co., 226.

LIFE INSURANCE. See **Insurance.**

LIMITATIONS. See **Trusts.**

1. **Estoppel.** If a defendant verbally agrees, on valid consideration, not to plead the Statute of Limitations, he will be estopped from pleading it. But such promise should be pleaded and proven. Mere request not to sue made by a debtor to a creditor will not sustain an estoppel. Railway Co. v. Elwood Grain Co., 432.

2. **State Of: Remedy: Statute of Forum.** The Statute of Limitations pertains to the remedy and the law of the forum applies except

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LIMITATIONS—Continued.

where there is a statute in the State where the remedy is sought, which applies the statute of the foreign State; such as Sec. 1895, R. S. 1909, of the Missouri statute. Railway Co. v. Elwood Grain Co., 432.

3. **Foreign State: Statute Applying Foreign Limitations.** A cause of action arose and accrued in the State of Kansas. The creditor resided in that State and the debtor resided in Missouri. The Statute of Limitations in Kansas was for three years for such claims, while that in Missouri was five. It was provided in Sec. 1895, R. S. 1909, of the Missouri statute that when a cause of action accrued in a foreign State and was barred by the limitations in that State it should likewise be barred in Missouri. It was *held* that the cause of action being barred in Kansas, was also barred in Missouri. Ib.

4. **Running Account: Intention.** Plaintiff residing in Kansas had claims against the defendant for demurrage and for freight charges. As these charges accrued plaintiff presented them to defendant, who rejected some and paid others. The evidence showed that these claims were not intended to constitute one running open account. It was *held* that the last item within the statute of limitations would not save the earlier items which were without the statute from the bar of limitations. Ib.

LIVERY STABLES.

Livery Stable Business: Stock of Merchandise: Fixtures and Equipment: Construction. The Bulk Sales Law, session acts of Missouri, 1913, p. 163, applying to the sale, trade, or other disposition of the major part in value or the whole of a stock of merchandise, or merchandise, fixtures, and equipment, or equipment pertaining to the vendor's business, has no application to the sale of the wagons, horses, harness, etc., of one whose business is that of owning and operating a livery and boarding stable; the words "stock of merchandise" as used, means goods or chattels which a merchant has for sale, and the words "fixtures and equipment" mean fixtures and equipment, or either one, pertaining to the vendor's business of merchandising. Balter and Miller v. Crum et al., 380.

MALICIOUS PROSECUTION.

Railroads. The plaintiff sued to recover damages, actual and punitive, for false arrest and malicious prosecution by the defendant. The plaintiff, the night and seal clerk for the defendant, assisted one Rhoades, also an employee, to repair a car door as ordered by their foreman, and after the repairs were made he undertook to reseal the car as instructed. While in the act of doing so, he was arrested by two special officers of the defendant and placed in jail, the officer claiming that plaintiff had stolen some merchandise. The plaintiff and Rhoades were indicted by the Federal grand jury but acquitted by the jury when placed on trial. *Held*, that the plaintiff was entitled to recover damages for false imprisonment on the first count of his petition. Steppuhn v. Railroad Co., 571.

MALPRACTICE. See **Physicians and Surgeons.**

MANDAMUS.

1. **Not Subject to Inspect and Copy nor Production.** Such complaint board were justified in their refusal to permit an inspection of a

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MANDAMUS—Continued.

letter, which was made the basis of a libel suit against the sender, and in refusing to allow a copy to be made of it, and neither the appellate court, nor the circuit court in which the action for libel is pending, can compel the production of the letter for the purposes sought. [ALLEN, J., dissenting.] State ex rel. v. Tune et al., 404.

2. **Railroads: Liquor Shipments.** The relator, a foreign corporation engaged in the manufacture and sale of beer in Illinois, brought mandamus proceedings to compel the respondent railroad to receive, carry, and transport and deliver beer over its line through a certain county in Missouri. A demurrer was filed by respondent and sustained, and relators appealed. *Held*, that the relator was endeavoring to compel the shipment of all liquor and its petition does not disclose definitely whether the sales were consummated in Kansas City or Adair County. If in the latter place they would be violative of the Local Option Law. State ex rel. v. Q., O. & K. C. R. R. Co., 668.

MASTER AND SERVANT.

1. **Liability for Injuries: Time and Opportunity for Discovery of Defects.** Where an employer's negligence consisted in ordering an employee to proceed with a negligently constructed appliance after knowledge of the defective condition of the appliance had been brought home to the foreman giving such order, the right of the employer to a reasonable time within which to discover the defect and repair it did not arise. Morgan v. Sunflower Zinc Co., 26.

2. **Actions for Injuries: Instructions: Conformity to Issues.** Where a petition charging negligence on the part of an employer respecting the defective condition of an appliance alleged that plaintiff did not know of the defective condition, an instruction authorizing a recovery if the danger was called to the foreman's attention by the employee, and if the foreman negligently assured the employee that there was no danger, was not erroneous as changing the issue made by the pleadings, as the foreman's order and his failure to warn the employee was material only as negativing contributory negligence. Ib.

3. Where an employee called his foreman's attention to the defect in a lever making it likely to slip, the foreman's statement that he guessed it was safe, and for plaintiff to continue pressing down on the lever, could not be construed by the employee as anything less than an assurance that his fear of danger was ill founded, and that he could safely proceed with the work. Ib.

4. **Actions for Injuries: Questions for Jury.** Where an employer had an appliance for prying or wedging apart shafts in order to tighten belts which worked on the principle of a lever requiring a man to press downward on the end of a gas pipe, and the appliance was not bolted at a place where it could slip off, and if it did slip off would permit the employee to fall to the floor, it was a question for the jury whether the manner in which the employer permitted it to be used was a reasonably safe method. Ib.

5. **Injury to Servant: Assumed Risk.** A railroad section hand replacing old with new ties assumed the risk of stumbling over fence posts scattered along the right of way and concealed by grass and weeds. Baker v. Lusk, 44.

6. **Injuries to Servant: Knowledge of Danger.** Where a servant, equalizing stave bolts by pressing a frame holding the bolt against two

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MASTER AND SERVANT—Continued.

saws, had eighteen inches of the bolt on which he could safely place his hand, knew a belt was apt to come off causing the bolt to roll back, and that if he held his hand at a certain place on the bolt it was apt to be caught, but failed to guard against the danger, his negligence barred recovery for a resulting injury. Bathe v. Stave & Mfg. Co., 127.

7. **Fellow Servants: Cement Finisher and Carpenter not Fellow Servants.** Where the testimony is uncontradicted that deceased was a cement finisher, and was employed in that capacity, and that he had nothing whatsoever to do with the building of a scaffold, nor with hanging or fastening same to the supports on the roof, nor with the moving thereof from time to time as the progress of the work necessitated but that such work was done by carpenters, the deceased was not a fellow servant of the carpenters in the building, fastening, or moving of the said contrivance, though all worked together upon it after it was built and at various times after it was moved from place to place in the progress of the work for men are frequently fellow servants when working in one capacity, and yet not fellow servants with reference to their work in another capacity. Most v. Goebel Const. Co., 336.

8. **Injury to Servant: Master's Negligence: Question for the Jury.** In an action by the wife of a servant for personal injuries resulting in his death, where the facts and circumstances appear to afford reasonable inferences of the masters negligent fastening of a chain supporting a scaffold which fell, causing such death, the question of the master's negligence was one for the jury. Ib.

9. **Injuries to Servant: Instructions.** In an employee's action for personal injuries due to being struck by an object falling from a building in the course of construction, because of the absence of temporary flooring, an instruction that if, while plaintiff was working on the third floor of the building a piece of building material or other substance fell from some floor, or location above, and struck plaintiff, by reason whereof plaintiff was knocked, or fell, from the third floor of said building to the first floor thereof, and was injured; and that at and immediately preceding, plaintiff's injuries, if any, the defendant failed to exercise ordinary care to have the joists or girders on each floor of said building above the second floor covered with scaffold boards or other suitable material, as the building progressed, so as to sufficiently protect workmen; that is, to make it reasonably safe for workmen and for the plaintiff from falling through such joists or girders of said building and to protect workmen, or make it reasonably safe for workmen, or plaintiff, who might be under or below the floors of said building from falling bricks, or other substances; and that such failure on defendant's part to have the joists or girders of each floor above the second floor of said building covered with scaffold boards or other suitable material to make it reasonably safe for workmen, or plaintiff, as the building progresses, was negligence, etc., was correct. Seitz v. Construction Co., 388.

10. **Injuries to Servant: Conflicting Evidence: Question for the Jury.** In such action, a peremptory instruction for defendant was properly refused, where the testimony, though conflicting, contained substantial evidence entitling plaintiff to go to the jury. Ib.

MATERIAL ALTERATION. See **Negotiable Instruments.**

MAINTENANCE. See **Divorce.**

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MERGER. See **Contracts.**

MISTAKE. See **Reformation of Instruments.**

MOTION FOR NEW TRIAL. See **Practice.**

MUNICIPAL CORPORATIONS.

1. **Ordinances: Effect of Partial Invalidity.** Where a general ordinance in section 1 provided that all able-bodied male persons between the ages of 21 and 60 should be liable for the poll tax, and in section 4 defined the duties of the street commissioner in the collection of poll taxes, the invalidity of section 1 under Revised Statutes 1909, sec. 9447, which only grants power to levy a poll tax on citizens between 21 and 50, did not render the whole ordinance invalid. Village of Nixa v. Wilson, 33.

2. **Ordinances Levying Taxes: Validity.** Under Revised Statutes 1909, sec. 9447, providing that the board of trustees, of a town or village shall, from time to time, provide by ordinance for the levy and collection of poll taxes, an ordinance levying a poll tax of $3 on all male inhabitants of the village, and which, it was claimed, was merely a levy for the current year, was sufficient to justify the tax, though based on no general ordinance on the subject of poll taxes. Ib.

3. **Engineer's Estimate: Lump Sum.** Where the engineer's estimate of the cost of public improvement of streets is in a lump sum and not itemized as by unit measure, but expressly refers to the plans and specifications and states that the estimate is according to them, so that taking the ordinance, the plans and specifications and the estimate together, there would be shown all the information that a detailed and itemized estimate would reveal, such estimate is sufficient. Frazier v. City of Rockport, 80.

4. **Municipal Corporations: Public Improvement of Streets: Connecting Streets.** To require each street of a city to be treated as one improvement and the property fronting on that street to participate only in the cost of improving it would lead to great difficulties, often forbidding an improvement entirely, or rendering it inadvisable unless adjacent streets were similarly improved and the whole done as one improvement. Ib.

5. **Ordinances: Advertising of Bids: Clerical Error.** An ordinance, directing a city engineer to advertise for bids for public work and providing that the "highest" bid be accepted is not vitally defective where there is no showing that the use of the word "highest" instead of "lowest" had any effect upon the number of bidders or upon the bids made, the entire bidding being advertised and carried out on the theory that the lowest competitive bid was sought and the contract eventually let to the lowest bidder. Ib.

6. **Front Foot Rule.** Under the "front foot" rule each lot abutting on public streets in a city must bear its proportionate share of the entire cost necessary to improve all the streets embraced within the plan or scheme of improvement and not the mere cost of the portion in front of it. Ib.

7. **Pedestrian Crossing Street: Duty to Look.** It is the duty of a pedestrian, before starting to cross a street in the thick business part of a street, especially at a point not a regular crossing, to look. Lowery v. Smith, 163.

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MUNICIPAL CORPORATIONS—Continued.

8. **Contractor's Lien for Improvements: Enforcement: Limitation of Lien.** Section 25, article 6, of the Charter of the city of St. Louis provides that a tax bill shall become a lien upon the property charged therein and may be collected of the owner of the land and in the name of the contractor, as any other claim in any court of competent jurisdiction; by a subsequent provision of the same section it is declared that the lien of a tax bill shall be destroyed and of no effect against the land charged therewith unless proceedings shall have been commenced to collect the same within two years from the maturity of the bill and still be pending. *Held*, that the two year period prescribed after which the lien is to terminate is not a mere statute of repose to bar actions, but is a limit to the existence of the lien, and, therefore, unless the suit is instituted against the owner within that time, such lien expires and cannot be revived and enforced against the interests of the owner of the land. Paving Co. v. Realty & Imp. Co., 226.

9. **Ulta Vires: Charter of Kansas City.** The provisions of the charter of Kansas City prohibiting "shows" or "exhibitions" in parks or public grounds has no application to children riding on Shetland ponies in such parks. The riding of ponies by children for pleasure, amusement and recreation in public parks is not a "show" or "exhibition." Longwell v. Kansas City, Mo., 480.

10. **Negligence: Municipal Corporations.** Kansas City is the owner of a pleasure ground called "Swope Park" and maintained therein, among other forms of amusement, Shetland ponies for a profit, and invited all children to ride them for their pleasure and amusement. The agent of the city negligently put plaintiff upon the back of one of the ponies and started him off unattended and plaintiff was thrown by the pony and injured. It was *held* that the city having undertaken to provide these ponies for the amusement, recreation and pleasure of children, it was liable for neglience of its agents and servants in handling such children and ponies. Ib.

11. **Ordinances: Rule of Construction.** Legislative intent is the cardinal rule of the construction of ordinances as well as statutes, and while it is within the jurisdiction and the duty of the court to construe any legislative enactment because of indefiniteness and uncertainty, and endeavor to adopt a construction which will make the statute operative when possible to do so consistent with reason, yet it is not a function of the judiciary either directly or indirectly to enact legislation nor read into any such enactment that which is not either expressed in the statute itself or appears to have been intended thereby, and where the language of an ordinance is clear and concise, and admits of but one interpretation, the court is not authorized or warranted in speculating as to what might have been intended by such ordinance. Norton v. E. St. Louis Ry. Co., 550.

MUTUAL MISTAKE. See **Insurance.**

NEGLIGENCE. See **Automobiles: Chattel Mortgages: Courts: Landlord and Tenant: Master and Servant: Municipal Corporations: Practice: Telegraphs and Telephones.**

1. **Personal Injuries: Appurtenances.** Plaintiff rented of one of the defendants the first floor and basement of a two-story house, but knew nothing of a coal cellarway under the sidewalk in front of the premises. While walking on the sidewalk she stepped on the cover of the coal hole and it gave way, due to the decayed condition

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NEGLIGENCE—Continued.

of the wooden rim on which the cover rested, and she was thereby severely injured. It was *held* that as there was not only absent from the premises anything that made it apparent or to suggest to the plaintiff (the tenant) that the coal cellarway existed but the tenant was able to enjoy the use of the premises without the use of the cellarway, such cellarway was not an appurtenance to the premises and therefore, plaintiff, as tenant, not being required to keep the cellarway in repair, was not barred, by reason of her tenancy of the premises, from recovering damages for her injuries from the owner. Sands v. Kansas City, 13.

2. **Issues: Contributory Negligence.** Where the jury found that an appliance in the nature of a lever was not reasonably safe, and there was no affirmative plea of contributory negligence, the employer could not escape liability, unless an injured employee was guilty of contributory negligence on the theory that the danger was so apparent and glaring that no ordinarily prudent man would have placed his weight on the lever, knowing its condition. Morgan v. Sunflower Zinc Co., 26.

3. **Liability for Injuries: Contributory Negligence.** Though an employee suspects that an instrumentality is defective, he has the right to rely on the superior knowledge of his master, and it is only where the danger is so imminent that no ordinarily prudent man would undertake the work, regardless of what the master said about it, that he is barred on account of contributory negligence in continuing to use the instrumentality after being assured by the master that it is safe to proceed with the work. Ib.

4. **"Assumption of Risk."** By assumption of risk is meant that the servant assumes all of those incidents and customs which ordinarily exist in the work in which he is concerned. Baker v. Lusk, 44.

5. That section hand replacing old with new ties in defendant's railroad track stumbled over fence posts scattered along the right of way and covered with grass did not show negligence of defendant. Ib.

6. **Evidence: Joint Defendants: Relative Duties and Obligations.** In an action for damages for personal injuries against joint defendants the latter are not permitted to bring into the case the relative duties and obligations existing between themselves, as such a controversy involves the liability of each to the plaintiff, and not their responsibilities among themselves designed to define their rights in their business relations to each other. The law-making power, and not the defendants, can alone promulgate their obligation and liability to plaintiff. Knox v. M. K. & T. Ry. Co., 64.

7. **Proof.** Mere proof of injury to a shipment of live stock while in transit will not make a prima-facie showing of negligent operation so as to cast the burden of disproving negligence on the carrier. Robinson v. Bush, 184.

8. **Scaffold-Structure: Construction of Statute.** A platform sixty feet from the ground, supported at one end by chains swinging from the roof, the other end resting on poles running along the side of the building, and furnished by the master for the use of his workmen while erecting or repairing a building is a scaffold or structure within the meaning of section 7843, Revised Statutes of Missouri 1909, which requires all scaffolds or structures used in or for

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NEGLIGENCE—Continued.

the erection, repairing or taking down of any kind of building, shall be well and safely supported, and so secured as to insure the safety of persons working thereon or passing under or about the same, against the falling thereof. Most v. Goebel Const. Co., 336.

9. **Street Railroads: Contributory Negligence: Operation of Cars: Duty to Warn: Question for Jury.** Evidence *held* to present a question for the jury to say whether or not the failure of a street car motorman to ring the gong and give warning to plaintiff, who started across the track thinking he had time to clear the car, was negligence. Woodis v. United Railways Co., 348.

10. **Last Chance Doctrine.** Where plaintiff's testimony shows that when he saw the car some 170 feet away he did not realize its speed, and supposed he could cross the street before it would reach him; and added to that the testimony that the car could have been stopped within forty feet, and that there was sufficient light at that place for plaintiff to be seen by the mortorman at a much greater distance, made it a question for the jury to say whether or not the motorman saw, or by the exercise of ordinary care could have seen, plaintiff in peril, and whether liability shoud be cast upon defendant as for negligence on the part of the motorman in failing to exercise ordinary care in using the means at hand to stop or slacken the speed of the car to avoid injuring plaintiff, under the last chance doctrine. Ib.

11. **Contributory Negligence: Prima-facie Case: Question for the Jury.** In such a case the burden then shifts to the defendants, if they rely upon the plaintiff's negligence, to disprove or overcome that case to the satisfaction of the jury; such prima-facie case having been made out, the case can never be peremptorily taken from the jury; for, however strong the controverting testimony of plaintiff's contributory negligence may be, its credibility and weight are for the jury. Cuccio v. Railroad Ass'n, 365.

12. **Contributory Negligence: Question for the Jury.** Where deceased, a street railway track repairer, who, on orders from his foreman, placed his tools on such push car and with others rode thereon down a considerable grade, at the foot of which were several railroad tracks, which were guarded by a watch tower, gong and gates and a watchman was posted at the time in the tower, whose duty it was to ring the gong and lower the gates upon the approach of a train, and the evidence shows that the gates were left open, and the gong on the tower was not rung, and that deceased, before going on to the push car, at a distance of more than a block away, looked and saw no train in sight and found the gates open, and that the gates remained open up to the time the tender of a backing locomotive struck the push car on the crossing, and that the bell on the engine was not rung and no whistle blown, nor was any man stationed of the tender, as required by the rules, etc., *held* that the deceased could not be guilty of contributory negligence as a matter of law, and that the court properly held that the plaintiff had made out a prima-facie case. Ib.

13. **Evidence: Admission of Ordinance.** Even though in such case there is no common-law rule providing for the putting in of floors as the work progresses, nevertheless, where an injury results from the failure to put in floors and the statute or ordinance requires them, the omission goes to the establishment of negligence and the ordinance, doing no more than making special, specific provisions,

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NEGLIGENCE—Continued.

was not improperly admitted although not pleaded, as tending to show negligence, and while it is true that when a party alleges specific acts of negligence, he is held to the proof of those acts, that is very far from holding that when a party alleges negligence, generally, he cannot prove specific acts. Seitz v. Construction Co., 388.

14. **Street Cars: Unreasonable Speed.** Whether a person, injured when struck by a street car, was guilty of contributory negligence as a matter of law in failing to look again for an approaching car after he had already looked and could only see one a hundred feet away, depends on what was a reasonable rate of speed for street cars, under the circumstance, and whether he would then have had time to cross the street car track and avoid being struck had the car been running at a reasonable rate of speed. Draper v. K. C. Ry. Co., 485.

15. **Duty of Motorman: Maintain Lookout.** It is the duty of a motorman of a street car to maintain such a lookout as will enable him to see the first appearance of danger and his employer will not be liable for failure to maintain such a lookout unless the danger appeared soon enough to use means to avert it. Ib.

16. **Humanitarian Rule: Question for Jury.** If the motorman of a street car saw, or could have seen, a person in a confused or terrorized state standing apparently unable to decide how to get off the street car tracks, it was his duty at that time to slacken the speed or stop his car. Ib.

17. Where a child of tender years goes into danger, and the motorman saw her and could reasonably have avoided the injury but did not do so, or in other words the motorman's negligence was subsequent to that of the child; and therefore the proximate cause of the injury, even under the Kansas rule, this should have been submitted to the jury. Malott v. Harvey and Dunham, 615.

18. **Street Railways: Minors.** The plaintiff, a minor sued by her next friend to recover damages for injuries received when she was struck by the defendant's street car. She passed over the northbound track and almost cleared the southbound track, when a street car came up behind her from the south and struck her with its northeast corner knocking her violently to the pavement and injuring her. *Held*, that the court erred in not submitting to the jury the question of whether or not the motorman saw the plaintiff in time to have avoided the injury. Ib.

19. **Street Railways: Humanitarian Doctrine.** The plaintiff sued to recover damages from defendant for the negligent killing of her husband. The deceased was driving a wagon on 15th street, and while doing so, seeking to cross the street, was run into by defendants' street car and killed. The evidence tended to show that the motorman saw the deceased in a position of peril but failed to stop the street car in time to avoid the collision. *Held*, that in view of the facts that appeared in the evidence the motorman should have stopped the car, and that the defendants' demurrer to the evidence was properly overruled. Miller v. Harvey, 627.

20. **Street Railways: Newsboys.** The plaintiff a newsboy, while riding on the steps of the defendant street railway with one hand holding on the upright iron handhold and newspapers underneath the other arm, was struck on the hand by the conductor, breaking his

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NEGLIGENCE—Continued.

hold on the handhold and causing him to fall from the car so that a rear car or trailer passed over his leg. The plaintiff sues to recover damages received for injuries resulting from the fall. *Held*, that it is within the line of a street railway conductor's duty to eject persons from his car and it was not error for the court at plaintiff's request to instruct the jury assuming such to be the fact. Griffin v. K. C. Ry. Co., 682.

21. **Fellow-Servant: Vice-principal.** Defendant's general foreman instructed plaintiff, who worked for defendant, to help another employee, a servant in another line of work. The general foreman told the other servant to tell plaintiff what to do and the foreman told plaintiff to do as the other servant directed. While in the act of lighting the gas under refining stills, an act unfamiliar to plaintiff and a work in which the other servant was instructing plaintiff at the time, the other servant turned on the gas before a signal was given by plaintiff and an explosion occurred injuring the latter. It was *held*, that under the circumstances related in evidence it was for the jury to say whether or not the other servant was at the time of the accident acting in the capacity of a fellow-servant of a vice-principal and whether such other servant was acting in a dual capacity at the time of the injury. Bradshaw v. Standard Oil Co., 688.

NEGOTIABLE INSTRUMENTS.

1. **Alteration: Beneficial: Injurious.** It is equally unimportant whether the alternation was beneficial or injurious. The question is not whether the party has been or could be injuriously affected, but whether or not his rights have been materially affected. It necessarily follows that any alteration of an instrument by which it is made to cover a subject-matter greater, or less, or different than that embraced in it before the alteration is material. The motive with which the words were written is entirely immaterial so far as their effect as an alteration is concerned. A material alteration by one not a stranger to it will avoid the instrument, though innocently made. Mechanic's American National Bank v. Helmbacher, 173.

2. **Negotiable Note.** The presumption is in favor of the integrity of a negotiable promissory note; but if the note on its face appears to be in different handwriting, written at different times and in different ink, this destroys the presumption of integrity. Ib.

3. **Endorsee's Knowledge.** If an endorsee had actual knowledge at the time he took the note that the place of payment had been removed, or changed, or knowledge of such facts that his action in taking the instrument amounted to bad faith, then he cannot be a holder in due course. Ib.

4. **Place Of Payment.** The shearing off the place of payment is the same as a change of the place of payment, or the addition of a place, when no place is specified. Ib.

6. **Holder In Due Course.** By the Negotiable Instruments Act the to the original tenor of the note. Ib.

5. **Original Tenor.** A holder in due course can recover only according holder in due course is one who takes such instrument complete and regular on its face, before due, in good faith, for value and

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NEGOTIABLE INSTRUMENTS—Continued.

without notice, at the time it was negotiated, of any infirmity in the instrument, or defect in the title of the person negotiating it, and notice of such infirmity, or defect, requires actual knowledge of such facts as will make the act of taking the instrument amount to bad faith. An endorsee cannot shut his eyes to things apparent on the face of the instrument and seek security in the mere assertion that he did not know. Ib.

7. **Material Alteration.** Change in the place of payment with no intention to defraud is a material alteration; change in the date; in the sum payable, either for principal or interest; the number or relation of the parties, or the medium of currency in which payment is to be made, or which adds a place of payment where no place of payment is specified, or any other change, or addition, which alters the effect of the instrument in any respect, is a material alteration. Ib.

8. **Bills and Notes: Checks.** The action of a bank in holding the checks for more than twenty-four hours without returning them, does not constitute an acceptance of them and make the bank liable for the amount of the checks (section 10107, R. S. 1909) where it is shown that the bank called up the other bank which issued the checks and notified it that it would not pay them and that no demand had been made for their return. Savings Bank v. Am. Trust Co., 491.

9. **Renunciation: Part of Note.** Under section 10092, R. S. 1909, of the Negotiable Instrument Statute the holder may renounce a part of the note. Dickinson v. Vail, 458.

10. **Absolute and Unconditional: Conditional.** If an "absolute and unconditional" renunciation is made by the holder to the principal debtor it releases all parties to the instrument. But this would not prevent the holder from making a conditional renunciation to any of the parties including the principal debtor. Ib.

11. **Status: Renunciation: Consideration.** It is provided in the Negotiable Instrument Statute (Sec. 10092, R. S. 1909) that the holder of a note may renounce his rights against any party to the instrument. It was *held* that to renounce did not necessarily mean without consideration, and that though a written renunciation was given upon a consideration, it was valid. Ib.

NEWLY DISCOVERED EVIDENCE. See **New Trial.**

NEWSPAPER ARTICLES. See **Evidence.**

NEW TRIAL.

1. **Newly Discovered Evidence: Discretion of Trial Court.** The granting of a motion for a new trial on the ground of newly discovered evidence rests largely in the discretion of the trial court, and many things must be present, such as the element of diligence, the probability of the new evidence producing a different result, and that it is not merely cumulative or simply to impeach the character or credibility of witnesses, before such a motion should be granted. Knox v. M. K. & T. Ry. Co., 64.

2. **Review: Granting: Ground not in Motion.** The granting of a new trial cannot be sustained on any error in refusing an instruction, this not having been complained of in the motion for new trial. Lowery v. Smith, 163.

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NEW TRIAL—Continued.

3. **Order Granting.** On an appeal allowed by Revised Statutes 1909, sec. 2038, from an order granting a new trial, while the exercise of a pure discretion, as on the ground of the weight of the evidence, or that perjury has been committed, will not be interfered with, yet where the ground is purely a judicial one, or an error of law as in the giving or refusing instructions, the matter will be reviewed. Lowery v. Smith, 163.

4. **Pleading and Proof: New Trial.** The petition asked for punitive as well as exemplary damages and the jury returned a general verdict without specifying which kind of damages they gave, whether such circumstances would constitute reversible error is not passed upon as the objection was not raised in the defendant's motion for a new trial, or in its motion in arrest of judgment. Griffin v. K. C. Ry. Co., 682.

5. **Misconduct of counsel: Objections.** If the defendant objects to the conduct of plaintiff's counsel in the trial of the case and the court does not rebuke counsel on request, it cannot be reviewed on appeal unless an exception is saved. Ib.

NOTARY PUBLIC.

1. **Bonds: Negligence in taking Acknowledgment: Liability: Damages.** A notary's bond is purely one of indemnity, and where suit is brought thereon the relator is limited in the amount of the recovery to the actual loss sustained by the negligent act of the notary, the liability extending only to such damages as were proximately caused by such act. State ex rel. v. Packard, 53.

2. **Jurisdiction.** A court does not lose its jurisdiction of a petition for divorce by reason of the act of the law partner of plaintiff's attorney in swearing the plaintiff to the petition, in his capacity as a notary public, because there is nothing either in common law or under the statute forbidding such an act to be performed by an attorney of record and hence such an affidavit is not a nullity. State ex rel. v. Davis, 439.

ORDINANCES. See **Municipal Corporations: Negligence.**

OTHER INSURANCE. See **Insurance.**

PARTITION.

Attorney Fees: Power of Court to Allow. In an action in partition, the trial court is employed to allow the attorneys bringing the suit, a reasonable fee for their services to be taxed as other costs in the case, and the fact that the plaintiff sells his interest in the property to one of the defendants before final decree is entered, does not deprive the court of such power. Tanner v. Tanner, 145.

PARTNERSHIP. See **Administration.**

1. **Settlement of Partnership Estate: Common Law.** Upon the death of one of two partners, the right to settle the partnership estate vests in the surviving partner under the common law, and such right is not dependent upon the latter giving bond as required by section 91, Revised Statutes 1909. His failure, however, to give such bond might warrant the administrator of the deceased partner's individual estate, should one be appointed, in taking possession of the partnership assets. State ex rel. v. Hubbard, 137.

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PARTNERSHIP—Continued.

2. If the surviving partner does not qualify under the statute as administrator of the partnership estate, but acts merely under his common-law authority, then upon his death the right and duty of administering upon the partnership estate devolves upon his administrator. Ib.

PASSION AND PREJUDICE. See **Verdicts.**

POLL TAX. See **Taxation.**

PRACTICE. See **Taxation.**

1. **Pleading: Matters to be Proved: Unnecessary Allegations.** Where the petition in an employee's action for injuries charged negligence concerning the defective condition of an appliance, an allegation negativing his knowledge of the dangerous and negligent condition was unnecessary and redundant, and merely anticipated the defense of contributory negligence, and did not throw on plaintiff the burden of maintaining such unnecessary allegation.. Morgan v. Sunflower Zinc Co., 26.

2. **Trial: Demurrer to Evidence:: Hearing and Determination.** In passing upon a demurrer to the evidence, every reasonable inference of fact arising from the evidence and tending to establish plaintiff's case is to be taken as true. Ib.

3. **Affidavit: Pleading.** The fact that the pleading or statement in the affidavit for attachment, said that defendants who were husband and wife, were about to remove their property out of the State with intent to change their domicile, did not, in the absence of any showing that the wife refused to recognize or abide by her husband's decision, require proof as to the formation of a personal intention on the wife's part to change. If such was an allegation as to the wife's intention it was merely a pleading thereof according to its legal effect. Ware v. Flory, 60.

4. **Question for the Court.** Where the evidence is such that no two reasonable men could differ, such questions should be determined by direction of the court and in this case we find no substantial evidence justifying the submission to the jury of the question of plaintiff's actual knowledge that the place of payment had been removed, or knowledge of such facts as to make the taking amount to bad faith. Mechanics' American National Bank v. Helmbacher, 173.

5. **Trial Practice: Instructions: Failure to Request.** Where the court, in overruling an objection of defendant to admissions of its codefendant, admissible as to him, stated specifically that the statement was admissible only against the latter, the court did not commit prejudicial error in not instructing the jury, of its own motion, that such statements could be considered by them as affecting the latter defendant alone; counsel for defendant school having made no request for such instruction. Atkinson v. Am. School of Osteopathy, 251.

6. **Trial Practice: Evidence: Harmless Error.** In such action, permitting the agent, over defendant's objections, to testify as to the amount paid by him to the life insurance company out of the total cash payment to him by defendant, was not prejudicial to plaintiff. Patten v. Miller, 287.

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PRACTICE—Continued.

7. **Trial Practice: Improper Remarks of Counsel: Failure of Court to Reprimand: Error.** Where plaintiff's counsel in addressing the jury stated: "Yes, he (defendant) takes the very money he collected with the consent of this now aged woman—young and vigorous that he is, the only heir as the testimony goes in this case, of Mrs. Griffith, to I forget how many acres they said was in that farm, the only heir, and he takes this money and buys another farm, and uses it, and then looks you in the face and pleads the 'baby act' and don't deny it—," *held* that such argument was improper, and, after objection thereto, the court should have promptly taken steps to reprimand counsel, and required that the remarks be withdrawn, and to instruct the jury to disregard same to alleviate the baneful effect of such argument. Pledge v. Griffith, 303.

8. **Trial Practice: Appellate Practice: Demurrer to Evidence: Right to Recover.** The question as to plaintiff's right to recover at all was raised by the demurrers to the evidence interposed below, and is consequently presented in the appellate court by the record. Thompson v. Paving Co., 356.

9. **Pleading: Aider by Judgment: Statute.** In an action for personal injuries to an employee struck by an object falling from a building in the course of construction, the petition averring common-law negligence in failing to provide a safe place to work, in the absence of a motion to make more specific, was sufficient after judgment, although it did not aver violation of a building ordinance requiring temporary floors, in view of Rev. St. of Mo. 1909, section 7843, providing that all persons engaged in the erection, repairing, or taking down of any kind of building shall exercise due caution and care as to prevent injury or accident to those at work or nearby, since the ordinance requiring temporary floors is but a particularization of the statute. Seitz v. Construction Co., 388.

10. **Trial Practice: Appellate Practice: Objections in Trial Court: Motion for New Trial: Sufficiency: Instructions.** Where the only attacks in the motion for a new trial, made upon the action of the court on instructions, which is to the action of the court "in giving instructions to the jury as asked by plaintiff, duly objected to by defendant," and "in refusing proper declarations of law asked by defendant," the appellate court might decline to consider these assignments of error because of the language of the motion for new trial. Seitz v. Construction Co., 388.

11. **Framing Issue of Fact for Jury: Equity.** Issues of fact for submission to a jury in equity cases may be prepared by the court, or counsel under the direction of the court, or may be prepared by counsel and submitted to the court for approval and where the court directs counsel to prepare such issues it is their duty to make a bona-fide effort to comply. Randolph v. Gas Co., 425.

12. **Voir Dire: Improper Questions: Prejudice.** A woman and her husband were defendants in an action for assault and battery. Plaintiff's counsel in examining jurymen on their *voir dire* was permitted to ask them if they knew the woman-defendant's father, calling him by name and designating him as "the gambler." It was *held* to be error. Moore v. Doerr, 428.

13. **Jury: Discharge: Objection.** If a case on trial at the end of a term of the circuit court is continued into the succeeding term of the same court, in the same county, the prior term ended *ex vi*

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PRACTICE—Continued.

termini legis, and the jury is discharged from any further consideration of the case. And a defendant's objection at the succeeding term is timely. Neal v. Kansas City Ry. Co., 498.

14. **Trial Practice: Negligence: Continuance to Succeeding Term.** If a trial unfinished at the end of one term of a circuit court, is continued into the first day of a succeeding term of the same court, in the same county, and then proceeded with to the end of the trial, the proceedings in the latter term are invalid and the judgment rendered thereon should be reversed. Ib.

15. **Question for jury.** Whether the right of an employee to safeguard the company's property also includes the right to make an arrest is a question for the jury to determine. Steppuhn v. Railroad Co., 571.

16. **Jury.** While there was no direct evidence that defendant's agents testified before the grand jury, *held*, that the facts and circumstances were such for the jury to say that they did so testify and that the testimony given was false. Ib.

17. **Pleading: Interpleader.** The fact that a bank, interposing its plea for a bill in the nature of an interpleader, did not follow the steps laid down in section 94, Laws 1915, page 148, is not fatal since that act says: "The remedy provided in this section shall be in addition to and not in exclusion of remedies now or hereafter existing." Bathgate v. Exchange Bank of Chula, 583.

18. **Instructions: Pleading and Proof.** A defense which is based upon a contract different from the one stated in the pleading, and a case is presented upon this theory, over the plaintiff's objection, all instructions which related to the evidence offered are erroneous. Lebrecht v. New State Bank of Oklahoma, 642.

19. **Pleading and Proof.** A defendant cannot plead in defense one contract and offer in evidence a totally different one. Ib.

20. **Pleading.** A mere allegation in a petition to produce books and accounts for inspection that the evidence is material and necessary won't do, since that is a mere conclusion of the pleader, but the facts should be alleged how and why the production or inspection is necessary so that the court may know and determine for itself the necessity thereof. Dowden v. Walrus Mfg. Co., 657.

PRESUMPTIONS. See **Evidence; Negotiable Instruments.**

PHYSICIANS AND SURGEONS.

Malpractice: Evidence: Statements of Agent: Admissibility Against Principal. In an action against a school of osteopathy and a member of its faculty, who, it is alleged, while treating plaintiff, negligently broke her sternum, it not being controverted that such member treated plaintiff as the agent and employee of the school, what was said either by the president or dean of the faculty of the school, while making a diagnosis of plaintiff, at the request of such defendant member, with reference to what they or either of them found to be the *then* condition of plaintiff's sternum, ribs, etc., is admissible; such statements being made in the scope of their duty and while in the actual performance thereof. Atkinson v. Am. School of Osteopathy, 251.

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PRINCIPAL AND AGENT. See **Corporations.**

1. **Authority of Agent to Bind Principal: Builders: Agency of Architects.** Although in general a builder is not liable for the architect's failure to return guaranty checks on rejection of bids, yet it may be shown that architects were acting for the defendant corporation in such a manner as to bind the corporation. Fairbanks v. Morse & Co. v. Market House Ass'n., 317.

2. **Evidence: Agency of Architects.** Evidence *held* not only sufficient to sustain the charge of the petition that such firm of architects were agents of defendant and to show actual agency, but in point of fact a participation as one of the promoters in the transaction. Ib.

3. **Indorsing Draft not Ratifiable.** Furthermore, there can be no ratification by the trustee of an act which it is not within his power to delegate to an agent to do. Stevens v. Home Ins. Co., 536.

PROHIBITION.

Picture: Rules Circuit Court: Contempt. The circuit court of Jackson County, Missouri, is composed of several divisions, presided over by separate judges, one of which is the assignment division. A judge of a division issued a temporary restraining order against the Chief of Police restraining him from arresting an exhibitor of a picture known as "I, Mary McLain—Men Who Have Made Love to Me." The writ was made returnable to the assignment division, where it was dissolved before return day. The police then arrested the exhibitor and the division judge issued an order against them in contempt, and the Chief of Police obtained a temporary writ of prohibition from the Court of Appeals. It was *held* that the division judge was without further jurisdiction after returning the first writ to the assignment division, and that he should be prohibited from pursuing the proceeding in contempt. State ex rel. v. Bird, 76.

PUNITIVE DAMAGES. See **Instructions.**

QUESTION OF FACT. See **Practice.**

RAILROADS.

1. Under Acts 1913, p. 177, amending Revised Statutes 1909, sec. 3121, declaring that in any action against a railroad corporation for damages on account of its failure to transport live stock within a reasonable time, proof of the failure to transport such live stock within a reasonable time shall constitute prima-facie proof of negligent delay casting on the corporation the burden of showing that the failure was not due to its negligence, *held* that the question whether a railroad company was guilty of negligent delay in the transportation of a shipment of live stock was for the jury. Robinson v. Bush, 184.

2. **Collision: Street Railroads: Push Car: Construction of Statute.** A push car without any mechanical apparatus for its propulsion, and primarily intended to convey tools and kindred paraphernalia used by the workmen, yet not intended to be used for conveying them, does not fall without the intendment of Rev. St. of Mo. 1909, section 3303, requiring each car on a street railroad track to be brought to a full stop before reaching railroad tracks, and making it the duty of some employee to go forward and ascertain whether a train was approaching. Cuccio v. Railroad Ass'n., 365.

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RAILROADS—Continued.

3. **Collision: Street Railroads: Negligence: Question for the Jury.** Where a terminal railroad locomotive was delivering cars to a through road and, returning, backed across a grade street railroad crossing, although the watchman in the tower was not its employee, nor were the tracks upon which the collision occurred, nor the gates erected thereon, owned or operated by it, yet such defendant may be found liable if it passed over said street railway tracks and failed to give the necessary warning of its approach; and under the record in this case its liability *vel non* was properly *held* to be a question for the jury. Ib.

4. **Crossing: Material: Character of Crossing: Duty.** In constructing a railroad crossing it is required by statute to be made of gravel, macadam or planks, and that the plank outside each rail, shall be approached by gravel or macadam six inches deep substantially and properly joined up to the plank. It is also required that the crossing shall be "good and sufficient." So where a crossing is defectively made of gravel inside the rails, if the plank would have made it good and sufficient the railway company would be negligent in not using plank. And so if gravel and macadam on the outside of the rails could not be joined up to the outside planks without the use of cement, it would be the duty of the company to use cement, though it is not mentioned in the statute. Crane v. K. C. So. Ry. Co., 448.

5. **Street: Regulation of Speed: Construction of Ordinance.** Section 1 of section 1240, Revised Ordinances of the City of East St. Louis, Ill., of 1908, providing that street cars shall not run "at a greater average speed between terminals than twelve miles per hour," cannot be construed as limiting street cars to a maximum speed of twelve miles per hour but said ordinance merely restricts the operating of street cars at a greater average speed between terminals. Norton v. E. St. Louis Ry. Co., 550.

REBATE. See **Insurance.**

REFORMING INSTRUMENTS.

1. **Mistake: Character of Mistake.** Where the owner of property told the agent on seeing the policy that she owned the property and the policy was in the husband's name and the agent assured her that the policy protected her against loss, there was a mutual mistake of mixed law and fact warranting reformation of the policy. Horine v. Royal Ins. Co., 107.

2. **Right to Remedy: Proof Required.** To warrant reformation of instrument for mistake, the mistake must be mutual. and the party asserting such mistake must prove it by evidence which leaves no reasonable doubt in the mind of the court, though the same degree of proof required in criminal cases is not necessary. Ib.

RENUNCIATION. See **Negotiable Instruments.**

REPAIRS. See **Landlord and Tenant.**

REPLEVIN.

1. **Jurisdiction of Missouri Court of Appeals: "Suit Requiring Construction of Revenue Laws."** A suit by a former county collector of revenue against his successor in office to collect four per cent

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REPLEVIN—Continued.

commission on delinquent taxes paid the latter, but for which suits had been instituted by the former collector while still in office, is not a "suit requiring a construction of the revenue laws" within Const., art. 6, sec. 5, as amended in 1884, placing such matter within the jurisdiction of the Supreme Court, and the Court of Appeals has jurisdiction. Douglass v. Ray, 24.

2. **Mortgages and Deeds of Trust: Growing Crops.** A lessee of the mortgagor of land, under a lease made subsequent to the mortgage, with notice of the terms thereof, without the concurrence of the mortgagee, has no greater right to crops, growing on said land and unsevered, than the mortgagor himself would have after condition broken. State Bank of Trenton v. Knott, 90.

3. **Automobiles: Repairs: Lien: Memorandum in Writing.** Under the statute (Sec. 1, page 327, Laws 1915) one who furnishes material and does repairs on an automobile cannot have a lien therefor, unless a memorandum of the work and material be made in writing and signed by the owner. Butterworth v. Soltz, 507.

SALES.

1. **Delivery: Question for Jury.** Where there is evidence *pro* and *con* as to delivery and acceptance of chattels, the question is for the jury. Whether there was delivery and acceptance of a bull which died on the way to the scales to ascertain the price. *Held*, under the evidence, for the jury. Reudiger v. Dennis, 102.

2. **Frauds, Statute Of: Delivery: Acceptance.** It is not essential that absolute legal title to goods shall pass in order to render effective under the Statute of Frauds (Rev. St. 1909, sec. 2784) an acceptance and receipt of goods; but such acceptance and receipt will sustain the contract, although absolute legal title is only to pass on the happening of some event, and such may be true even when a seller has the right of stoppage *in transitu*. Ib.

3. **Transfer of Title.** Where property is turned over to vendee, cash on delivery, or where nothing is said about payment, there is no transfer of title until price is paid. Ib.

4. There can be a completed sale, even though counting, weighing, or measuring is to be done to determine the amount due. Ib.

5. **Frauds, Statute Of: Delivery and Acceptance: "Accept and Actually Receive."** The expression "buyer shall accept . . . and actually receive" in the Statute of Frauds (Rev. St. 1909, sec. 2784), providing that if a vendee of personalty shall accept and actually receive the property no memorandum or cash payment is necessary to bind him for the purchase price, means that there shall be a surrender by the seller of all dominion and control over the thing sold and an acceptance and receipt by the purchaser with intent to absolutely appropriate it as his own; the test being whether the vendor has lost his lien. Ib.

SHERIFFS AND CONSTABLES.

Construction of Statutes: Constable's Bill of Sale: Conclusiveness: Evidence. A constable's bill of sale purporting to convey shares of corporate stock is not controlled by the provisions of Rev. St. of Mo., 1909, section 2231, making sheriff's deeds to real estate sold under execution prima-facie evidence of the truth thereof, nor does

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SHERIFFS AND CONSTABLES—Continued.

section 2230, relating to sales of corporate stock, make the recitals of such a bill of sale prima-facie evidence of the truth of the matters so recited, and hence the recitals of such instrument do not constitute prima-facie evidence to show that there was a valid judgment, execution, levy, and sale. Baumann v. Horn, 555.

STOCKHOLDERS. See **Contracts.**

STATUTORY PROVISIONS. See **Insurance.**

STATUTE OF FRAUDS. See **Sales.**

STREET RAILROADS. See **Instructions: Negligence: Railroads.**

Statute of Frauds. It is not necessary that the plaintiff plead the Statute of Frauds in her reply in order to make that point in a trial, for under a general denial contained in her reply to the defendant's answer the plaintiff could object to any offer to prove, by oral testimony, things that were required to be in writing. Ogden v. Fire Ins. Co., 611.

STATUTES CITED AND CONSTRUED.

Session Acts.

Laws of 1913, p. 322, see page 24.
Laws of 1913, p. 177, see page 194.
Laws of 1913, p. 189, see page 376.
Laws of 1913, p. 190, see page 376.
Laws of 1913, p. 163, see page 384.
Laws of 1915, p. 269, see page 430.
Laws of 1915, p. 696, see page 449.
Laws of 1915, p. 327, see page 508.
Laws of 1915, p. 148, see page 589.
Laws of 1917, p. 246, see page 223.

Revised Statutes 1879.

Section 6009, see page 122.

Revised Statutes 1889.

Section 5897, see page 122.
Section 7143, see page 149.

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10022, see pages 177, 586.
10026, see page 80.
10040, see page 180.
10057, see page 180.
10092, see page 460.
10094, see page 179.
10095, see page 179.
10107, see page 496.
10155, see page 496.
10159, see page 587.
10437, see page 23.
10626, see page 449.
11385, see page 244.
11481, see page 24.
11484, see page 24.
11486, see page 24.
11488, see page 24.
11489, see page 24.
11490, see page 24.
11491, see page 24.
11493, see page 24.
11494, see page 24.
11495, see page 24.
11497, see page 24.
11498, see page 24.
11505, see page 24.
11511, see page 24.

SUBROGATION. See **Administration: Equity: Taxation.**

Subrogation to Claim against Estate: Secured Incumbrances: Statute. Section 197, Revised Statutes 1909, provides that when a claim is allowed against an estate, which is secured by a mortgage, deed of trust, or other lien, held by the creditors, the same may be allowed as other claims, but shall not be paid until such security held by the claimant has been exhausted; but if the security be not sufficient to pay off and discharge the debt of such creditor, then such creditor, for the residue of the debt, shall be entitled in common with other creditors, to have it paid out of the estate. *Held*, that since, under the statute, mortgagees of realty specifically devised, who had the amounts of their debts paid off in full through the sale of the property secured by the deeds of trust, they purchasing the property at such foreclosure sale, such mortgagees had thereafter no claim whatsoever against the estate of the deceased; also, they had no claim against such estate on the theory of subrogation, for on that theory they can only stand in the shoes of the mortgagee at the time of the death of the decedent. Peck v. Fillingham, 277.

TAXATION. See **Evidence: Municipal Corporations.**

1. **Collection: Commissions on Delinquent Taxes: Statute.** A county collector of revenue who had brought suits for delinquent taxes was entitled to the four per cent commission thereon, though the taxes were received by his successor in office. Douglass v. Ray, 24.

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TAXATION—Continued.

2. **Poll Taxes: Demand and Refusal to Pay.** Where, on being asked to pay his poll tax by the street commissioner of the village, defendant replied: "To hell with the poll tax. He didn't pay no poll tax in the village of Nixa"—his answer was sufficient to show that a demand had been made and was refused. Village of Nixa v. Wilson, 33.

3. **Taxbills: Equity: Injunction.** In the absence of statutory provision requiring each street in a city to be treated as a single separate improvement, many streets and parts of streets may be embraced in one plan or scheme of public improvement, if in fact they can all be regarded as parts of the same improvement. The extent of such improvement and what shall be included in it, and its nature and character, are within the legislative discretion of the City Council, and a court of equity will only interfere to correct a clear abuse of the discretion. Frazier v. City of Rockport, 80.

4. **Tax Liens Distinguished: Right to establish Lien: Optional.** In the case of special tax bills the lien obtains against the owners and their interests in the land only by virtue of its being established against their interests in the land by proof, and not because it comprehends such interest whether or no, as a matter of law, and there exists only a right to establish a lien which attaches provided competent proof is made against the owner while the right of the lien exists. Paving Co. v. Realty & Imp. Co., 226.

5. **Special Tax Bills: Mortgages and Deeds of Trust: Improvements: Priority of Lien.** A special tax bill for street improvements, though subsequent to a deed of trust in point of time, takes priority over the latter. Ib.

6. **Parties Defendant.** In a suit to enforce a special tax bill under article 6, section 25, of the Charter of the city of St. Louis, the beneficiaries under a recorded deed of trust are owners within the charter provision, and are not concluded unless they are made parties to the suit. Ib.

7. **Taxes: Subrogation: Mistake.** The plaintiff sued to recover from the defendant taxes paid out on the wrong piece of property by Nancy D. Monroe, now deceased. The latter during her lifetime owned an adjacent lot to that of the defendants and by mistake paid the taxes on their lot instead of on her own. The mistake was made by the city and the taxpayer and the plaintiff desires to be subrogated to the rights of the city and recover back the taxes wrongfully paid. *Held*, that there is no power in equity to order plaintiff or her estate, subrogated to the rights of the city so as to enable the enforcement against the defendant's property of the lien which the city had for taxes thereon. Jacobs & Feller v. Webster, 604.

TELEGRAPHS AND TELEPHONES.

1. **Transmission of Messages: Delay.** That the receiving agent of a telegraph company not knowing the closing hours at the terminal office, and merely contracting to transmit and deliver the message according to the rules of the company, failed to notify the sender that the terminal office was closed does not make the company liable for delay in delivery of the message, resulting from the fact that the terminal office was closed when it was sent. Diffenderffer v. W. U. Tel. Co., 48.

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TELEGRAPHS AND TELEPHONES—Continued.

2. **Transmission: Delay: Recovery.** In an action for negligent delay in the transmission of a telegram, it appeared that the message was written on a blank, reciting on its face that the message was sent subject to the terms on the back. The back of the blank contained recitals stating that to guard against mistakes and delays the message should be repeated, and that it was agreed that the company should not be liable for mistakes or delays or for nondelivery of any unrepeated message beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, nor for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured. There was no averment that a special value was placed on the telegram. *Held*, that as the conditions placed no value on the message, the value thereof might be fixed by the jury. Ib.

3. **Damages: Interstate Commerce.** The plaintiff sued to recover damages for the delay by the defendant in transmitting a telegram. There were two routes by which a telegram could be transmitted from Kansas City to Triplett, Missouri, one interstate and the other intrastate, but it was necessary to use a relay for both transmissions. The defendant transmitted the message through the interstate route, and the telegram was delayed several hours to the plaintiff's damage. *Held*, that since the message was transmitted as an interstate message, the defendant was not subject to the penalty as provided in section 3330, Revised Statutes 1909. Taylor v. W. U. Tel. Co., 624.

4. The fact that the origin and destination of a telegram was in one certain State does not make the message or telegram an intrastate one when its course or route takes it out of the State. Ib.

TORTS. See **Husband and Wife.**

TRANSACTIONS BETWEEN OTHER PARTIES. See **Evidence.**

TRUSTEE SALES. See **Insurance.**

TRUSTS.

1. **Express: Limitations: Disavowal.** The Statute of Limitations does not run against an express trust unless the trust be openly disavowed. Moulden v. Train, 509.

2. **Consent: Fiduciary Relation: Possession: Discharge.** When a person assumes, with or without consent, to act as trustee of money, that is, to act in a fiduciary relation with regard to it, and has in consequence been in possession of it, he is trustee of an express trust and cannot discharge himself except by accounting to the *cestui que trust*, without regard to the lapse of time. Ib.

3. **Particular Words to Establish: Admission.** It is not necessary to use any particular words to establish an express trust, such as "trust" or "trustee." Nor is it necessary that the admission of the trusteeship be addressed to any particular person. Ib.

4. **Mortgages and Deeds of Trust: Trustees in Deeds of Trust: Powers: Indorsing Draft not Delegable: Fire Insurance.** The loss under a fire insurance policy, payable to the trustee in a deed of trust, as interest may appear, is not paid where the draft of the insurer,

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TRUSTS—Continued.

made payable to the owner and such trustee, was delivered to the owner, endorsed by the owner, and taken to the office of the trustee whose son endorsed the name of the trustee on the draft, and delivered it to the agent of the insurer, who converted the proceeds, and *held*, that the holder of the note was entitled to have the trustee, and no one else for him, determine when to append his signature to the draft, and received the funds into his own hands and make proper disposition thereof, or see to it that before surrendering the draft, endorsed by him as trustee, that the note secured by the deed of trust was properly credited with a payment of the amount of the draft. Stevens v. Home Ins. Co., 536.

VENDOR AND PURCHASER.

1. **Vendor's Lack of Title: Purchaser: Rescission: Damages.** If the vendor in an executory contract for the sale of land has no title, nor no interest in it, but the purchaser believes he had the latter, on learning that he has not, may repudiate the contract and will not be liable for damages to the seller. Nance v. Sexton, 461.

2. **Vendor's Interest: Fraud: Recission.** If the vendor in an executory contract for the sale of land knowingly deceives a purchaser into the belief that he is the owner of the land, when in fact, he has no interest in it, and the purchaser would not have entered into the contract if he had known the fact, the vendor is guilty of a fraud and the purchaser may repudiate the contract on learning of the deception. Ib.

3. **Executory Contract: Ownership of Land: Knowledge of Buyer.** One cannot make a valid executory contract for the sale of land which he does not own and in which he has no interest, unless the buyer knows he does not. Ib.

VERDICT. See **Appellate Practice.**

1. **Excessive Passion and Prejudice.** Where there is evidence of probative force that the plaintiff suffered a severe injury as the result of a collision, the action of the trial court in reducing the verdict by half does not show that the jury was governed by passion and prejudice. Knox v. M. K. & T. Ry. Co., 64.

2. A verdict in favor of plaintiff in a malicious prosecution suit establishes the truth of plaintiff's contention that he was lawfully on defendant's premises discharging his duties as an employee at the time of the arrest and refutes defendant's contention that he was on such premises burglarizing a car and the jury having found these facts for plaintiff, such finding amounts to a further finding that defendant's agents knew that they were testifying falsely before the grand jury when the indictment was obtained by them. Steppuhn v. Railroad, Co., 571.

VOIR DIRE. See **Practice.**

VOLUNTARY PAYMENT. See **Judgment.**

USURY.

Sales: Discounts. That vendor offered to sell machinery for $2100 cash or $2400 on time notes did not render a chattel mortgage for $2400 usurious. Haber Mfg. Co. v. Ellis, 96.

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WAGES.

Interstate Carrier: Overtime. The plaintiff sued to recover wages from defendant, under the Adamson eight-hour law the amount of overtime from January 1, 1917, to May 19, 1917. The case was tried on an agreed statement of facts, the defendant contending that the act did not apply to the plaintiff's contract of employment. *Held*, that the plaintiff was entitled to recover for the excess time figured correctly on the *pro rata* basis of the contract rate for regular time. Nelson v. Railway Co., 635.

WILLS.

Devise Subject to Incumbrance: Statute. Section 542, Revised Statutes 1909, provides that a charge or incumbrance upon any real or personal estate to secure the payment of moneys, etc., shall not be deemed a revocation of any will relating to the estate previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance, *held* that unless a will specifically provides otherwise, or the intent of the testator is manifest from the instrument itself that real estate devised subject to an incumbrance shall have the amount of the incumbrance paid off out of the assets, such real estate passes to the devisee subject to such incumbrance. Peck v. Fillingham, 277.

WRIT OF ERROR.

Coram Nobis. This ancient writ is frequently invoked to aid our code to the end that substantial justice may be done. It is parcel of that procedure which came to us from the common law. It issues out of the court in which the record lies and predicates upon errors of fact and not errors of law. It would lie at common law when the court had proceeded as though a fact which was material to its right to proceed existed, when it did not exist, and when the absence of the fact assumed to exist, entirely defeated the power of the court to attain a valid result in its proceeding. Where defendant dies after service of process, and before judgment, the writ of error *coram nobis* is the proper remedy. Warren v. Railway Conductors of America, 200.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

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contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188—, *executed on the* ——— *day of* ———, 188—;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In ompliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direc..

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

RULE 27. The defacement of books in the library by marking the margin of pages, or by drawing lines underneath printed matter, or by turning down the corners of leaves, is prohibited.

RULE 28. An abstract of the record is a court paper not for the exclusive benefit of either party; therefore, in printing such abstract the parties are forbidden to italicize any part of it, except where the record from which the abstract is taken is in italics. If italics are desired, they may be used in the statement, brief and written argument.

RULE 29. Where an original instruction is modified by the trial court, it is not necessary to print them separately in the abtract. The instruction, as modified, should be printed with the words of modification printed in italics, or between brackets, that the court may readily observe the point of difference.

RULE 30. Where there are several exhibits in the cause, they should be identified in the index to the abstract more definitely than by a mere number, or letter.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from an report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 177 Mo. App. 477.

Ordered by the court that rule 24 is amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, time consumed by either party in statement and arument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument of the argument of the case, shall otherwise order: *Provided, However*, in any case; and *Provided Further*, that in appeals or writs or error in causes originating elswhere than in the Courts of Common Pleas or the Circuit Courts the time for argument shall not exceed thirty minutes on each side unless the court for cause shown and before the commencement of tn argument shall grant further time

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court in extenso the written or printed argument on file, nor from the reports or text books.

Promulgated October 4, 1916.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

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RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the words appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing, and file

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six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over deeds or other documentary evidence, the abstract shall set out the substance of the same. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned. Unless the abstract conforms to this rule, costs will not be allowed for printing the same, and such abstract may be disregarded by the court.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just.

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st. 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

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RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a justice of the peace, the time for argument shall not exceed thirty minutes on each side.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.

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